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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE SQUILLACOTE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to vacate its judgment for want of subject matter jurisdiction, where appellate jurisdiction lies exclusively with the United States Court of Appeals for the Federal Circuit under 28 U.S.C. 1295(a)(2), on the grounds that the government had waived its jurisdictional objection by first presenting it in its rehearing petition and that transferring the action after rendering a decision on the merits would be inefficient.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Martin M. Arlook, Louis V. Baldovin, Jr., Harold A. Boire, Michael M. Dunn, Arthur Eisenberg, Emil C. Farkas, Robert S. Fuchs, Bernard Gottfried, Roger W. Goubeaux, Thomas C. Hendrix, Peter W. Hirsch, Wilford W. Johansen, Bernard Levine, William T. Little, Thomas W. Seeler, Henry Shore, Daniel Silverman, Joseph H. Solien, Robert J. Wilson, and Glenn A. Zipp are named as plaintiffs and as representatives of the plaintiff class, and were appellants in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on denial of rehearing (App., *infra*, 1a-19a) is reported at 747 F.2d 432. The initial opinion of the court of appeals (App., *infra*, 20a-44a) is reported at 739 F.2d 1208. The opinion of the district court (App., *infra*, 45a-67a) is reported at 562 F. Supp. 338.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 68a-69a) was entered on July 13, 1984, and a peti-

tion for rehearing was denied on November 2, 1984 (App., *infra*, 1a-19a, 70a). On January 17, 1985, Justice Stevens extended the time within which to file a petition for a writ of certiorari until March 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 127(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a), provides in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
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> * * * * *
>
> (2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title; * * *

Section 129(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1346(a), provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
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> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States * * * in cases * * * which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. * * *

Section 301(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1631, provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT

This is an action for back pay brought by a class of federal employees in the United States District Court for the Eastern District of Wisconsin pursuant

to the "little Tucker Act," 28 U.S.C. 1346(a)(2). The district court ruled in favor of the government, and plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit. That court affirmed in part and reversed in part. Shortly after its decision was announced, government counsel noticed for the first time that jurisdiction over the appeal lies exclusively with the United States Court of Appeals for the Federal Circuit under 28 U.S.C. 1295(a)(2). The government's timely petition for rehearing raising this issue was denied with an opinion.

1. Congress created the Senior Executive Service (SES) in 1978 to attract and retain highly qualified executive managers. See Title IV of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1154 *et seq.* The SES comprises at least five pay levels, with SES-1 the lowest. Pay rates for members of the SES are set and periodically adjusted by the President (5 U.S.C. 5382(a)). The rates so established supersede all prior SES pay rates (5 U.S.C. 5382(d)). When the SES became effective on July 13, 1979, positions formerly within two other federal pay systems—the Executive Schedule [1] and the General Schedule [2]—were converted to SES positions; incumbent employees had the option of converting or remaining under their prior system. The highest rate paid to members of the SES may not exceed the rate for level IV of the Executive Schedule (5 U.S.C. 5382(b)). See App., *infra*, 22a-23a, 47a-49a.

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[1] The Executive Schedule covers executive-level employees. It includes five pay levels, with level I the highest and level V the lowest. See 5 U.S.C. 5311 *et seq.*

[2] Most civilian federal employees are paid and classified under the General Schedule. See 5 U.S.C. 5101 *et seq.*, 5331 *et seq.*

Congress froze salaries for fiscal year 1979, the first year that the SES was in existence, at the rates payable on September 30, 1978, for those federal employees whose salaries were fixed at or limited to rates equal to or greater than the rate payable for level V of the Executive Schedule (EL-V). See Pub. L. No. 95-391, § 304(a), 92 Stat. 788 (5 U.S.C. 5318 note).[3] Although Section 304(a) was enacted prior to the CSRA, the government determined that its provisions applied to the SES, and therefore limited SES pay for fiscal 1979 to the 1978 pay rate for EL-V. See App., *infra*, 24a-25a, 49a-50a.

The President issued an order pursuant to 5 U.S.C. 5382 adjusting SES rates of pay for fiscal year 1980 on October 9, 1979. The government continued to limit SES pay to the rate established for level EL-V. The level V rate was raised by 5.5% on October 12, 1979, pursuant to Section 101(c) of Pub. L. No. 96-

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[3] Section 304(a) provided:

> No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—
>
> (1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or
>
> (2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

86, 93 Stat. 657 (5 U.S.C. 5318 note).[4] Section 101 (c) limited salary increases to 5.5% for executive employees "who under existing law are entitled to approximately 12.9% increase in pay." See App., *infra*, 34a-36a, 50a-51a.

The President adjusted SES pay rates for fiscal year 1981 pursuant to 5 U.S.C. 5382 on October 16, 1980. The government again limited SES pay during the year to the EL-V ceiling, relying on three Joint Resolutions passed by Congress between October 1980 and June 1981, which froze federal salaries at the

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[4] Section 101(c) provided in pertinent part:

> For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.
>
> *Provided, further,* that for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of section 304 [of Pub. L. No. 95-391], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

rates payable on September 30, 1980.[5] See App., *infra*, 43a-44a, 51a-52a. The cap for SES salaries was raised to level IV of the Executive Schedule, the maximum amount permitted by 5 U.S.C. 5382(b), beginning January 1, 1982 (App., *infra*, 52a-53a).

2. a. Respondents brought this action in 1981 in the United States District Court for the Eastern District of Wisconsin on behalf of themselves and similarly situated members of the SES, challenging the pay caps on the salaries they received during fiscal years 1979, 1980, and 1981. Jurisdiction was based on the so-called little Tucker Act, 28 U.S.C. 1346 (a)(2), which provides for concurrent jurisdiction in the district courts and the Claims Court over certain claims against the government not exceeding $10,000.[6] On cross-motions for summary judgment, the district court ruled in favor of the government on all counts (App., *infra*, 45a-67a) . With respect to fiscal year 1979, the district court rejected respondents' argument that the CSRA had created "new positions which would enable [respondents], by converting to those positions, to move out from under the fiscal 1979 pay cap" (App., *infra*, 55a). Similarly, the district court concluded that the subsequent statutory pay caps applied to SES positions, noting that

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[5] Pub. L. No. 96-369, 94 Stat. 1351 *et seq.*; Pub. L. No. 96-536, 94 Stat. 3166 *et seq.*; Pub. L. No. 97-12, Tit. III, 95 Stat. 95.

[6] No member of the respondent class has a claim in excess of the jurisdictional amount. Cf. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Snyder* v. *Harris*, 394 U.S. 332 (1969); see also *Fitzgerald* v. *Staats*, 429 F. Supp. 933 (D.D.C. 1977), aff'd, 578 F.2d 435 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978). The class is composed of 5,000-6,000 members (App., *infra*, 21a), most with claims of more than $5,000.

"[t]here can be little doubt that Sec. 101 [of Pub. L. No. 96-86, 93 Stat. 656] was meant to limit the pay of SES employees" (App., *infra*, 65a), and citing a conference report confirming Congress's intent to limit the 1980 pay raise of SES employees to 5.5% (App., *infra*, 66a). Finally, the district court found that, because the three Joint Resolutions capping federal pay for fiscal 1981 were tied to the salary rates payable for fiscal 1980, the government had acted properly in limiting SES pay rates to level V of the Executive Schedule during the final period at issue in the complaint (App., *infra*, 66a-67a).

b. Respondents appealed to the United States Court of Appeals for the Seventh Circuit. The court of appeals affirmed the district court's order with respect to fiscal 1979, but reversed with respect to the remaining counts (App., *infra*, 20a-44a). With respect to fiscal 1980, the court of appeals held that Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657, the pay limitation in question, applied only to federal employees "who under existing law are entitled to approximately 12.9 percent increase in pay." The court of appeals held that this limiting description did not apply to SES employees because the 12.9% figure had apparently been derived from increases authorized under another statute that was not applicable to the SES and because SES employees would not otherwise have been entitled to a 12.9% increase (App., *infra*, 37a-41a). The court of appeals concluded that the Conference Report relied upon by the district court, despite the clarity of its statements regarding the applicability of the pay limitation to the SES, was not a basis for "redraft[ing] the provision" (App., *infra*, 43a). Based on its conclusion with respect to fiscal 1980, the court of appeals also held that re-

spondents' salaries had been frozen at an incorrect level for 1981 (*id.* at 43a-44a).

3. Upon receiving the court of appeals' decision, government counsel realized for the first time that respondents had taken their appeal to the wrong court. Under 28 U.S.C. 1295(a)(2), the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals in little Tucker Act suits, except for tax cases.

Congress established the Court of Appeals for the Federal Circuit in the Federal Courts Improvement Act of 1982 (FCIA), by merging the former Court of Claims and the Court of Customs and Patent Appeals (see 28 U.S.C. 41, 1295). The FCIA also created a new Article I trial forum, the United States Claims Court, which inherited the trial jurisdiction of the Court of Claims (see 28 U.S.C. 171 *et seq.*, 1491 *et seq.*). The Senate Report stated the purpose of these provisions of the Act as follows:

> to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity; to improve the administration of the patent law by centralizing appeals in patent cases; and to provide an upgraded and better organized trial forum for government claims cases.

S. Rep. 97-275, 97th Cong., 1st Sess. 2 (1981).

Section 127(a) of the FCIA provides that the Federal Circuit shall have "exclusive jurisdiction * * * of an appeal from a final decision of a district court * * * if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title" (28 U.S.C. 1295(a)(2)). The district court's jurisdiction

here was founded on the little Tucker Act, 28 U.S.C. 1346(a)(2) (see page 7, *supra*). A proviso in Section 1295(a)(2) excepts from the Federal Circuit's jurisdiction appeals from the district courts in little Tucker Act cases "when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue." The FCIA also provides that, if an action is filed in or an appeal is taken to the wrong forum, "the court shall, if it is in the interest of justice, transfer such action or appeal" to the court with jurisdiction over it, and the case "shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for" the transferor court (28 U.S.C. 1631).

In view of these provisions, the government timely filed a petition for rehearing with suggestion for rehearing en banc advising the court of appeals "that although most unfortunate in terms of now being so belatedly raised, [the] court was simply without jurisdiction to entertain this appeal in the first instance" (U.S. Reh'g Pet. 5). The government requested that the court vacate its judgment and transfer the appeal to the Federal Circuit (*id.* at 6).

4. The court of appeals denied the government's rehearing petition in a lengthy opinion (App., *infra*, 1a-19a),[7] concluding that, although "the United States Court of Appeals for the Federal Circuit normally would have had exclusive jurisdiction of this appeal," the court could refuse to vacate its judgment and transfer the case where the government had "presented the jurisdictional argument for the first time after losing the case on the merits" (*id.* at 1a-2a).

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[7] The suggestion for rehearing en banc was also denied (App., *infra*, 70a).

a. The court of appeals began its analysis of the jurisdictional issue by examining the exception to the Federal Circuit's jurisdiction in favor of the regional courts of appeals "when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue" (28 U.S.C. 1295(a)(2)). Respondents had contended, in response to the government's rehearing petition, that the phrase "providing for internal revenue" modifies only "regulation of an executive department" and not "Act of Congress." The court rejected respondents' reading as illogical, noting that it "makes no sense" to require "a dispute over an executive regulation not pertaining to internal revenue to go on appeal to the Federal Circuit, while mandating that a dispute over the statute on which the regulation is based go on appeal to one of the regional circuits" (App., *infra*, 3a). The court also reasoned that respondents' position "seems too anomalous * * * to allow" in view of the narrow scope of the other exceptions to the Federal Circuit's jurisdiction contained in Section 1295(a)(2) (App., *infra*, 4a). Thus, the court "d[id] not question that this is, in general, the kind of case Congress intended for review by the Federal Circuit" (*id.* at 6a).

b. Despite its conclusion that 28 U.S.C. 1295(a)(2) vested exclusive jurisdiction over the appeal in the Federal Circuit, the court of appeals held that the circumstances of the case justified its refusal to vacate its judgment and transfer the case to that forum. The court noted that one of Congress's purposes in enacting the FCIA was to insure "efficiency in the appeals process" and stated that this goal would be "sabotage[d]" by transferring the case after it had rendered a decision on the merits (App., *infra*, 5a).

The court also pointed to the fact that the government did not, in its rehearing petition, challenge the merits of the court's decision (App., *infra*, 5a-6a) and stated that granting the petition "would in fact condone the very forum-shopping repudiated by Congress" in the FCIA (App., *infra*, 6a). The court of appeals therefore concluded that, notwithstanding its statutory lack of jurisdiction, it need not transfer a case that "has been fully argued and decided in a situation in which both the statutory meaning is ambiguous [8] and allowing transfer would defeat the purpose of that statute" (*ibid.*).

The court of appeals rejected the argument that defects in subject matter jurisdiction are not waivable, concluding that "subject matter jurisdiction assumes the same footing of other issues a party may raise when statutory competence rather than federalism and Article III power is at issue" (App., *infra*, 13a), and that "28 U.S.C. § 1295 both lacks the absolute quality the government would give it and lacks the import of statutes regulating federal-state relations" (App., *infra*, 18a). The court also relied on "[c]ases involving estoppel," stating that they "provide a clear example with some relevance for the issue" (*id.* at 14a). In this regard, the court criticized the government for what it characterized as "unconscionabl[e] delay[]" in raising the jurisdictional question and "deceptively handl[ing]" the issue by not discussing the tax exception to the Federal Circuit's jurisdiction in the rehearing petition (*id.* at 15a). Finally, the court expressed doubts about its ability to

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[8] The reference to ambiguity concerned the coverage of the "providing for internal revenue" exception. See page 11, *supra*; App., *infra*, 4a.

transfer the case to the Federal Circuit pursuant to 28 U.S.C. 1631 (App., *infra*, 16a-18a).

REASONS FOR GRANTING THE PETITION

The court of appeals' refusal to vacate its judgment notwithstanding its statutory lack of subject matter jurisdiction represents an unwarranted and fundamental departure from well established principles. If left unreviewed, the Seventh Circuit's holding that objections to subject matter jurisdiction may be waived and that, depending on the equities, a court may "ignore the otherwise clear dictates of a [jurisdictional] statute" (App., *infra*, 14a) will stand as a dangerous and troublesome precedent for courts construing a wide range of jurisdictional provisions. Moreover, the decision below represents a significant interpretation of the Federal Courts Improvement Act of 1982. The court's conclusion that the Act's jurisdictional provisions "lack[] the absolute quality" (App., *infra*, 18a) normally attributed to jurisdictional statutes contravenes both the language of the Act and Congress's express intent. For these reasons, review by this Court is warranted, and summary reversal may be appropriate.

1. As a preliminary matter, the court of appeals plainly was correct in concluding (App., *infra*, 2a-4a) that 28 U.S.C. 1295(a)(2) vests exclusive jurisdiction over this appeal in the United States Court of Appeals for the Federal Circuit. There is no basis for reading the statute to produce the "anomalous" (App., *infra*, 4a) result that all statutory little Tucker Act cases must be appealed to the regional courts of appeals, while all regulatory little Tucker Act claims are appealable to the Federal Circuit except for those

founded on tax regulations.[9] Such a reading would eviscerate the Federal Circuit's nationwide jurisdiction over contract and many other claims against the government. Although the Federal Circuit has not directly addressed the issue, it has noted that it has "exclusive jurisdiction * * * of appeals from District Court cases brought, in whole or in part, under 28 U.S.C. § 1346(a)(2) (*except for tax cases*)." *Spagnola* v. *Stockman*, 732 F.2d 908, 909 n.2 (1984) (emphasis supplied).[10] Other cases have been heard by the Federal Circuit or transferred there that apparently would not be within its jurisdiction if all statutory claims brought under the little Tucker Act were appealable to the regional courts of appeals. See *Oliveira* v. *United States*, 734 F.2d 760 (11th Cir. 1984) (per curiam); *Corwin* v. *Lehman*, 724 F.2d 1577 (Fed. Cir. 1984), cert. denied, No. 83-1761 (June 4, 1984); *Heisig* v. *United States*, 719 F.2d 1153 (Fed. Cir. 1983).[11]

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[9] The source of the court of appeals' concern (App., *infra*, 3a) appears to be the lack of punctuation setting off the entire exception, which would have left no doubt that the qualifying language referred to statutes as well as regulations. In the brief discussions of the exception in the legislative history, however, commas do set off the exception as a whole. See S. Rep. 97-275, 97th Cong., 1st Sess. 20 (1981); H.R. Rep. 97-312, 97th Cong., 1st Sess. 42 (1981). Nothing in the legislative history suggests that the absence of such clarifying punctuation in the statute itself has substantive significance.

[10] Cf. S. Rep. 97-275, *supra*, at 39 (additional views of Sen. Leahy) (noting opposition to specialized court for hearing tax appeals).

[11] *Milburn* v. *United States*, 734 F.2d 762 (11th Cir. 1984), relied on by the court below (App., *infra*, 18a), contains no discussion of the jurisdictional question. The court of appeals' speculation as to the decision's significance is wholly conjectural.

The court's description of Section 1295(a)(2) as "ambiguous" (App., *infra*, 4a) in this regard is simply without foundation. Even if such a characterization were accurate, however, any ambiguity is completely unrelated to the issue at hand—whether defects in a court's subject matter jurisdiction, once identified, may be waived.

2. a. The court of appeals' refusal to vacate its judgment notwithstanding its conceded lack of jurisdiction threatens to undermine a longstanding line of precedent regarding the absolute and nonwaivable nature of subject matter jurisdiction. Since this Court's earliest decisions, the law has been clear:

> [T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record, on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction * * *.

Mansfield, C. & L.M. Ry. v. *Swan*, 111 U.S. 379, 382 (1884); see also, *e.g.*, *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 125 (1804). As this Court has more recently observed:

> Subject matter jurisdiction * * * is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a

> party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Insurance Corp. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted). See also, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981) ("[i]f the appellate court finds that the order from which a party seeks to appeal does not fall within the [jurisdictional] statute, its inquiry is over"); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976); *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975). The doctrine is enshrined in Rule 12(h)(3) of the Federal Rules of Civil Procedure (emphasis added):

> *Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

This rule applies with full force to the jurisdiction of the United States Court of Appeals for the Federal Circuit. Nothing in the language of the Federal Courts Improvement Act of 1982 implies that its jurisdictional provisions are potentially waivable or otherwise less demanding than those found elsewhere in Title 28. Indeed, Congress reaffirmed in the strongest terms the absolute nature of the jurisdictional provisions it enacted with respect to the Federal Circuit:

> Before discussing the court's jurisdiction, it needs repetition here that the Federal courts are courts of limited jurisdiction. There is no presumption in favor of jurisdiction, and the basis for jurisdiction always must be affirmatively shown. It is not sufficient that jurisdiction merely be inferred argumentatively. * * *

> The defendant in a civil proceeding may, at any time, assert a court's lack of jurisdiction over the subject matter. Furthermore, even though the defendant has not so moved, Rule 12(h)(3), Federal Rules of Civil Procedure, expressly provides that a court "shall dismiss the action" "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." What this all amounts to is that a court's jurisdiction is not something that is easily manipulated.

S. Rep. 97-275, *supra*, at 18-19.[12]

Although it is unfortunate that neither the parties nor the court noticed the jurisdictional defect earlier in the proceedings, the court was obliged to vacate its judgment after the issue was presented to it in the government's rehearing petition. See, *e.g.*, *United States* v. *New York, N.H. & H. R.R.*, 276 F.2d 525, 543-544 (2d Cir.) (Friendly, J.) (vacating on suggestion of want of jurisdiction made for first time after denial of rehearing), cert. denied *sub nom. Tri-Continental Financial Corp.* v. *Glenmore*, 362 U.S. 964 (1960); *Cummings* v. *Redeeriaktieb Transatlantic*, 242 F.2d 275 (3d Cir. 1957).[13] Not only

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[12] Although Congress was largely concerned with the possibility that the Court of Appeals for the Federal Circuit might read its jurisdiction in an unduly expansive fashion, it nowhere suggested that the settled doctrine of nonwaivability, which it expressly endorsed, would not apply where, as here, a regional court of appeals has departed from the statutory limits on its jurisdiction.

[13] As the court stated in *Cummings* (242 F.2d at 275-276):

> The appellee now suggests, with apologies for raising the question now for the first time [in his petition for rehearing], that the court had no jurisdiction. He need not

does the decision below conflict with these cases, it is plainly at odds with this Court's own practice of addressing the existence of subject matter jurisdiction even when the question has not been addressed below. See, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 278 (1977); *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963); *Louisville & N. R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

b. The court of appeals' stated reasons for disregarding the firmly established principles just described do not withstand scrutiny. First, the court's argument (App., *infra*, 13a) that defects in subject matter jurisdiction are waivable "when statutory competence rather than federalism and Article III power is at issue" is erroneous. Even a "statutory grant of jurisdiction * * * reflects the constitutional source of federal judicial power" (*Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. at 701). The presence of direct federal-state concerns in a particular case, moreover, is not necessary to the treatment of subject matter jurisdiction as a nonwaivable requirement. Questions regarding the appealability of orders under 28 U.S.C. 1291, for example, implicate not federalism but Congress's policies regarding the orderly division of business between the federal

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apologize; the jurisdictional point is always open and the court should be alert to it whether counsel notes it or not.

We are constrained to agree that there is no jurisdiction in this case.

* * * * *

The opinion will be withdrawn, therefore, and the appeal dismissed for lack of jurisdiction.

courts—just as does 28 U.S.C. 1295(a)(2).[14] See, *e.g.*, *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4-5. Yet questions arising under Section 1291 and other such statutes have consistently been treated under the same absolute jurisdictional doctrines that the court of appeals refused to apply here. See, *e.g.*, *Donovan* v. *Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam) (vacating judgment and opinion of court of appeals for lack of jurisdiction under 28 U.S.C. 1252, 1291); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. at 740 (dismissing for want of an appealable order under Section 1291 "[t]hough neither party ha[d] questioned the jurisdiction of the Court of Appeals to entertain the appeal"); *United States* v. *New York, N.H. & H. R.R.*, *supra* (dismissing for want of jurisdiction under Expediting Act of 1903); *Cummings* v. *Redeeriaktieb Transatlantic*, *supra* (dismissing for want of jurisdiction under 28 U.S.C. 1292).[15]

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[14] In fact, Section 1295(a)(2) implicates much more than simply details regarding the business of the courts of appeals. In conjunction with the little Tucker Act, it is part of the government's waiver of sovereign immunity and as such must be carefully respected and strictly construed. See generally *United States* v. *Mitchell*, 463 U.S. 206 (1983); *United States* v. *King*, 395 U.S. 1 (1969). The government's consent to suit in little Tucker Act cases does not extend to allowing appeals to be heard in the regional courts of appeals, but only in the Federal Circuit.

[15] The reliance placed by the court of appeals on the cases it cites (App., *infra*, 9a-13a) in support of the notion that "a more flexible approach to subject matter jurisdiction [applies] when federal-state relations are not at stake" (*id.* at 9a) is misplaced. In *Estate of Watson* v. *Blumenthal*, 586 F.2d 925 (2d Cir. 1978), the court inquired into the relationship between the Tucker Act and the Administrative Proce-

The court of appeals' reliance on principles of "fairness" and "[c]ases involving estoppel" (App., *infra*, 14a) is plainly incorrect. As this Court stated in *Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, (456 U.S. at 702), "principles of estoppel do not apply" to questions of subject matter jurisdiction, and "no action of the parties can confer subject-matter jurisdiction upon a federal court." In *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), for example, the Court vacated a judgment for want of jurisdiction in a removed case on the motion of the party that had removed the action and subsequently lost on the merits. See also *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 377 n.21 (1978) ("asserted inequity * * * is irrelevant" where court lacks subject matter jurisdiction). In any event, the court of ap-

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dure Act because the statutes did not unambiguously resolve the jurisdictional issue. Here, as we have noted (page 15, *supra*), any possible ambiguity in the FCIA is unrelated to the question presented. In any event, the *Watson* court did not suggest that the jurisdictional question was waivable; to the contrary, it addressed the issue even though the district court "did not discuss the jurisdictional aspects of the case" (*id.* at 927). In *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 659 F.2d 1228 (D.C. Cir. 1981), the court concluded that the "straightforward language [of the Natural Gas Act] command[ed] [it] to accept jurisdiction" (659 F.2d at 1237); again, there is no hint that subject matter defects may be waived. Finally, in *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), the Court noted legislative history in support of its reading of a jurisdictional provision (*id.* at 70), and went on to vacate the decision rendered on the merits by the court of appeals even though there was no opportunity on remand for review by another court (*id.* at 72). Nothing in the Court's opinion suggests that a court may enter a judgment where it lacks the statutory power to do so.

peals' criticism (App., *infra*, 6a, 15a) of the government for forum-shopping and delaying in raising the jurisdictional bar is unwarranted.[16] While the government was undeniably late in raising the issue, it was the respondents, not the government, who noticed the appeal to the wrong court. And the court of appeals failed in its own obligation to inquire into its jurisdiction, "the first and fundamental question" raised "[o]n every writ of error or appeal" (*Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. at 382). Moreover, by seeking transfer to the Federal Circuit, we are giving up a favorable judgment from the court of appeals with respect to fiscal year 1979.

Finally, the court of appeals relied (App., *infra*, 4a-6a) on the goal of judicial efficiency. This policy cannot override Congress's unmistakable command that this appeal be heard only by the Federal Circuit. Cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 512 n.13 (1982) (burden imposed on federal courts by absence of exhaustion requirement in Section 1983 actions "is not sufficient to justify a judicial decision to alter congressionally imposed jurisdiction"). Indeed, if generalized notions of judicial efficiency could defeat limitations on a court's jurisdiction, no appellate court would ever be justified in vacating a lower court's decision on the merits of a controversy for want of subject matter jurisdiction. Cf. *Board of License Commissioners* v. *Pastore*, No. 83-963 (Jan. 8, 1985) (dismissing writ of certiorari as moot after case had been briefed and argued); *Donovan* v. *Richland County Ass'n for Retarded Citizens*, 454 U.S. at 390 & n.2 (vacating for want of jurisdiction where

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[16] The court of appeals' criticism (App., *infra*, 15a) of the government for failing to address the tax exception to the Federal Circuit's jurisdiction (see pages 13-15, *supra*) is wholly uncalled for and is in any event completely irrelevant.

court of appeals had entered two separate decisions and appellate review on remand was time-barred). Whatever the role of Congress's policies in enacting the FCIA, it is clear that they would be furthered, not thwarted, by the transfer of this action. Congress intended cases such as this to be adjudicated in a nationwide appellate forum in order to provide for uniform decisions. The refusal of the court below to transfer could create different results in similar cases, since other federal employees with claims analogous or related to those of respondents will be required to litigate in the Federal Circuit, which will not be bound by the Seventh Circuit's resolution of the merits.[17]

3. The court of appeals also concluded that it might not be able to transfer the appeal to the Federal Circuit pursuant to 28 U.S.C. 1631 and that transfer would be futile because the Federal Circuit would come to the same result as it had on the merits (App., *infra*, 16a-18a). Neither point is well taken. Section 1631, which was enacted as Section 301(a) of the FCIA, applies to appeals as well as to the filing of civil actions, a point overlooked by the court below. Hence, Congress could not have intended the statute to apply only to actions that had not yet been resolved on the merits.[18] The "interest of justice" language is

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[17] There are a number of executive personnel systems that are modeled after the SES and that follow similar salary rules, such as the General Accounting Office Senior Executive Service, the Senior Foreign Service, and the Veterans Administration's non-physician medical center directors. Persons in these positions are not within the respondent class, but they may have similar claims.

[18] Had Congress wished, it could have provided for subject matter jurisdiction in the regional courts of appeals where

no bar to transfer here—as between transfer and dismissal, the only choices legitimately open to the court, the former will obviously be more fair.[19]

Nor would transfer be futile. Our decision not to include the merits as a separate issue in the rehearing petition stemmed not from our acquiescence in the court's opinion on the merits, but rather from our conviction that the jurisdictional argument was dispositive. It would therefore have been both inappropriate and unnecessary to burden the court of appeals with a request for reconsideration of the merits. Although we similarly do not present the merits in this petition, to forestall misunderstanding we note briefly that we have strong arguments that the court of appeals erred in concluding that Congress did not intend Section 101(c) of Pub. L. No. 96-86, 93 Stat. 657 (covering fiscal year 1980) to apply to SES positions.[20]

The court of appeals concluded that the Section 101(c) pay cap (see note 4, *supra*) was inapplicable because it found that the Section's reference to employees "who under existing law are entitled to approximately 12.9 percent increase in pay" did not describe SES employees and therefore excluded them

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their jurisdiction is not challenged until rehearing. But Congress did not do so: its enactment of Section 1631 is further proof of its intent that a court without jurisdiction under the FCIA must dismiss or transfer the appeal. The one course a court cannot take is to refuse to vacate a judgment that it lacked jurisdiction to enter.

[19] The court of appeals appeared to recognize as much (see App., *infra*, 18a n.9).

[20] Because of the relationship between the pay cap statutes governing fiscal years 1980 and 1981 (see page 8, *supra*), a decision in favor of the government for 1980 would compel the same result with respect to 1981.

from the pay cap (App., *infra*, 37a-39a). The Office of Personnel Management estimates that SES employees paid at rates SES-4 through SES-6 (approximately 82% of SES members at the start of fiscal year (1980) were due an 11.3% raise (see *id.* at 38a-39a). The statute's use of "approximately 12.9 percent increase" therefore does not clearly exclude the SES. Moreover, it is not at all clear that the language relied on by the court of appeals was intended to limit the class of executive employees subject to the pay cap. Thus, given the statute's less than precise language, the court of appeals erred in refusing to defer to Congress's clearly expressed intention in the Conference Committee report to include SES employees within the pay cap:

> The conferees wish to note that by continuing the application of section 304 of the Legislative Branch Appropriation Act, 1979 [Pub. L. No. 95-391, 92 Stat. 788], *the joint resolution ensures that many individuals in positions which were transferred to the new Senior Executive Service (SES) may not receive pay increases of more than 5.5 percent.* Although under the Civil Service Reform Act the maximum rate of pay for the SES is set at level IV of the Executive Schedule, *those positions transferred into the SES earlier this year which on September 30, 1978, were subject to the level V ceiling will continue to be subject to the level V ceiling.*

H.R. Conf. Rep. 96-513, 96th Cong., 1st Sess. 3 (1979) (emphasis supplied). See, *e.g.*, *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976).

4. The court of appeals' ruling that Congress's grant of exclusive jurisdiction to the Federal Circuit is subject to waiver represents a significant interpre-

tation of the Federal Courts Improvement Act that is both incorrect as a matter of law and worthy of review by this Court. To our knowledge, the court below is the first court of appeals to hold that dispositive objections to a court's subject matter jurisdiction may be waived if not presented before the court's decision on the merits. Review of the decision below is, therefore, necessary not only to implement Congress's intent in enacting the FCIA, but also to ensure that the fundamental principles of subject matter jurisdiction established by this Court and founded on the Constitution continue to possess the "absolute quality" (App., *infra*, 18a) that the court found lacking in Section 1295(a)(2).

The court of appeals' determination that the jurisdictional language of Section 1295(a)(2) is more pliable than other jurisdictional provisions is directly contrary to Congress's intent and will have an impact on the subsequent interpretation of the Act, particularly with regard to the proper limitations on the Federal Circuit's jurisdiction. The principles espoused by the court below in reaching its decision are in direct conflict with the teachings of this Court and the other courts of appeals. The Seventh Circuit's reliance on generalized notions of judicial efficiency as a basis for waiving objections to a court's subject matter jurisdiction and its consideration of the parties' equities at the expense of the statute's language are potentially of great significance, as they could be applied to virtually every jurisdictional statute. Finally, respondents' claims total well over $30 million. The government is entitled to have these claims decided in the forum that Congress intended to be the exclusive appellate arbiter, short of this Court, of the dispute.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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FEBRUARY 1985

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-1882

GEORGE SQUILLACOTE, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 81 C 1553—John W. Reynolds, *Judge.*

ARGUED JANUARY 4, 1984—

DECIDED NOVEMBER 2, 1984

Before CUMMINGS, *Chief Judge*, PELL and CUDAHY, *Circuit Judges.*

CUMMINGS, *Chief Judge.* On consideration of the government's petition for rehearing confessing error regarding this Court's jurisdiction, we have concluded that under 28 U.S.C. § 1295(a)(2) the United States

Court of Appeals for the Federal Circuit normally would have had exclusive jurisdiction of this appeal. This case, however, is not in the usual posture. It has been fully briefed, argued, and decided, and we have issued our published opinion, *Squillacote v. United States*, 739 F.2d 1208 (7th Cir. 1984). Our examination of the Federal Courts Improvement Act of 1982 (the "Act" or the "FCIA"), on which the government bases its petition, convinces us that transfer of the case in this situation would thwart Congressional intent and that our retention of the case is consistent with the Act's purposes. We therefore deny the government's petition which presented the jurisdictional argument for the first time after losing the case on the merits.

I

Jurisdiction in the lower court was based on 28 U.S.C. § 1346(a)(2). Section 1295(a)(2) of title 28 would vest exclusive jurisdiction on appeal of such cases in the Court of Appeals for the Federal Circuit rather than in one of the regional Courts of Appeals,

> except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title.[1]

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[1] This exception was not even quoted in the body of the government's petition for rehearing (at page 3), although it is quoted in the appendix to the petition.

If the phrase "providing for internal revenue" modifies "Act of Congress" as well as "regulation of an executive department," then the government is correct in asserting that we lack subject matter jurisdiction. Plaintiff's counsel, however, makes several persuasive arguments that would restrict the limiting phrase's effect to the second phrase, "regulation of an executive department." The two most significant of these arguments involve accepted principles of statutory construction. First, the disjunctive "or" between "Act of Congress" and "regulation of an executive department" indicates that the phrases are alternatives and should be treated separately. See, *e.g.*, *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975). Second, the "doctrine of the last antecedent" would limit the phrase "providing for internal revenue" to its first antecedent, a "regulation of an executive department." *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 389-390; *Azure*, 514 F.2d at 900.

Nonetheless, we cannot accept plaintiff's reasoning. First, to require a dispute over an executive regulation not pertaining to internal revenue to go on appeal to the Federal Circuit, while mandating that a dispute over the statute on which the regulation is based go on appeal to one of the regional circuits, makes no sense. In addition, the other categories excepted from the Federal Circuit's exclusive jurisdiction involve either tax matters or matters involving peculiarly local law issues, such as suits to quiet title in land and tort claims against the government. See 28 U.S.C. §§ 1346(a), 1346(e), 1346(f), 1346(b). The categories are fairly narrow, and to permit appeal to the regional circuits on any matter involving an Act of Congress, when matters involv-

ing the Constitution and executive regulations not pertaining to internal revenue must go to the Federal Circuit, seems too anomalous a result to allow. Furthermore, rejecting plaintiffs' argument accords with the decisions in *Oliveira v. United States*, 734 F.2d 760 (11th Cir. 1984); *Spagnola v. Stockman*, 732 F.2d 908, 909 n.2 (Fed. Cir. 1984) (footnote by Chief Judge Markey describing the exceptions clause at issue here as relating to "tax cases"); and *Corwin v. Lehman*, 724 F.2d 1577 (Fed. Cir. 1984), certiorari denied, —— U.S. ——, 104 S.Ct. 2680.

Because the statutory language is ambiguous and because transferring the case at this late date is a drastic remedy, we do not end our inquiry with this conclusion. The Senate Report accompanying the Act states explicitly that "[t]he Committee intends for the jurisdictional language to be construed in accordance with the objectives of the Act." S. Rep. 275, 97th Cong. 2d Sess. 20, reprinted in 1982 U.S. Code & Ad. News 11, 30.[2] Our review of the broad purposes of the Act convinces us that we can effect those purposes only by denying the government's belated request.

II

The majority of the legislative history accompanying the enactment of the FCIA centers on the need for centralized review of patent appeals. See *id.* at 2-7, reprinted in U.S. Code Cong. & Ad. News 11, 12-17; 127 Cong. Rec. H8389-H8392 (1981) (Rep.

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[2] We are also mindful of the Report's insistence that the proposed change was a modest one in the federal court system, and that the jurisdiction of the Court of Appeals for the Federal Circuit is to be construed strictly. See S. Rep. 275, *supra*, 7, 19-20, reprinted in 1982 U.S. Code Cong. & Ad. News 11, 17, 29-30.

Kastenmeier, bill co-sponsor) ; 127 Cong. Rec. S14692-14696, S14721-S14722 (Sen. Dole, bill co-sponsor). A second purpose, however, was to "improve[] the administration of the system by reducing the number of decision-making entities within the federal appellate system." S. Rep. 275, *supra*, at 3, reprinted in 1982 U.S. Code Cong. & Ad. News 11, 13. Senator Dole, the co-sponsor of the Act, remarked in introducing the legislation that the "present system requires a case to be considered at two separate levels within the U.S. Court of Claims before a claimant's right can be fully adjudicated." 127 Cong. Rec. S14692 (1981). The legislation addressed this fault by merging the Court of Claims with the Court of Customs and Patent Appeals into a new Article III forum, the Court of Appeals for the Federal Circuit. The bill, said Rep. Kastenmeier, the legislation's sponsor on the House side, "substantially improves the administration of the law in the areas of patents, government contracts, trademark and international trade; * * * and results in improved functioning of the Federal appellate system." *Id.* at H8389. He defined the bill's purpose as being to alleviate the heavy caseload on the circuit courts and to provide uniformity in patent law. *Id.* at H8390.

In the current case no patent issues are at stake. Consequently the only statutory purpose that might be affected is the one of efficiency in the appeals process. That being so, insuring that our decision fulfills this intent gains in importance. Our acceding to the government's request would sabotage the goals of the legislation. It would require the parties to reenact the process already fully complied with in our courtroom, thereby imposing additional and unnecessary delays and expense on both parties and on our judicial resources. The government does not

quarrel so far with our disposal of the merits of the case; its only present complaint is the jurisdictional one. Nevertheless, our granting the government's request would eviscerate the very purposes for which Section 1295 was written. It would in fact condone the very forum-shopping repudiated by Congress in enacting the FCIA. The Senate Report stated, "The Committee is concerned that the exclusive jurisdiction over patent claims of the new Federal Circuit not be manipulated. * * * It is not intended to create forum shopping opportunities between the Federal Circuit and the regional courts of appeals on other claims." S. Rep. 275, *supra*, at 19-20, reprinted in 1982 U.S. Code Cong. & Ad. News 11, 29-30. Although this statement addresses specifically the possibility parties would add spurious patent claims to claim the jurisdiction of the Federal Circuit, the reasoning applies to the instant situation in which the government is using the Act blatantly to forum shop. We will not allow the government to so frustrate the purposes of the FCIA, and we do not believe that Congress intended such a result to occur. We do not question that this is, in general, the kind of case Congress intended for review by the Federal Circuit, but, as our discussion of legislative intent illustrates, this is a rare exception to the jurisdictional scheme, which is dictated by the purposes underlying the FICA. The unusual posture of this case guarantees that our decision is a very limited one. Only after a case has been fully argued and decided in a situation in which both the statutory meaning is ambiguous and allowing transfer would defeat the purpose of that statute would our decision be permissible.[3]

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[3] Opponents of the Act voiced two main objections: that the new Court would construe its own jurisdiction too liberally,

Policies underlying the area of jurisdiction in general further buttress the result we reach. Professor Wright, in his hornbook on the federal courts, approves the reminder of former Justice Benjamin Curtis that questions of jurisdiction are " 'questions of power as between the United States and the several States.' " C. Wright, The Law of Federal Courts

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and that it would be a "specialized court." While our refusing to transfer this case might be interpreted to realize the second concern, by denying to the Federal Circuit the opportunity to hear the case and thus limiting the variety of its docket, any actual impact is negligible. The Court's decision, limited as it is to one case only in very special circumstances, cannot measurably deprive the Federal Circuit of a rich and diverse docket.

The government might also argue that our decision itself actually subverts Congressional intent by defeating uniformity of decision. Any impact on uniformity is also negligible. The number of cases in which the government raises its jurisdictional challenge in a timely fashion illustrates how unlikely this precise situation is to arise again. See, *e.g., Oliveira v. United States, supra.* Since this case is a class action, controversy over the Congressional Acts at issue here will not arise again. While the issue of the effect of a freeze on salary increases might again be disputed in the future, it nonetheless is one that arises only infrequently. By that time litigants, especially the government, will be more attuned to when Section 1295 applies, so that they will surely raise the jurisdictional issue in a timely fashion. And nothing indicates that our decision on the merits conflicts in any way with other circuits' resolution of any similar situation.

If this case had turned on patent law, the calculus might have been different. Then, given the importance of patent cases in the formation of the Federal Circuit, we might have decided that effectuating Congressional intent required transfer to the Federal Circuit, regardless of the impact on judicial efficiency. The instant case, however, does not present that very different situation.

1 (4th ed. 1983). He admits that permitting even those parties who had themselves invoked federal jurisdiction to challenge that jurisdiction after they have lost on the merits is a "harsh rule." *Id.* at 23. He can justify this rule only on the basis of "the delicate problems of federal-state relations that are involved." *Id.* Professors Hart and Wechsler, as well as the American Law Institute, severely criticize the rigid position that Professor Wright and the current state of the law would accept. See Hart and Wechsler's The Federal Courts and the Federal System 837-839 (2d ed. 1973); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 64-65, 370-374 (1969). The ALI would not permit issues of subject matter jurisdiction to be raised after the beginning of trial, unless the court finds that the parties have colluded or the parties could not reasonably have been expected to raise the issue earlier. American Law Institute, *supra*, § 1386. The Reporters explained their belief that it "is necessary and proper to the exercise of Article III power that procedures be devised to require issues of jurisdiction to be timely raised, and to prevent their use to take unfair advantage of opposing parties or to impede the administration of justice." American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 108-109 (Official Draft 1965). Application of this proposal to this case would automatically foreclose the government's claim, because, even if the government's argument is correct, it could have discovered the defect earlier had it been exercising reasonable diligence. It would now be foreclosed from raising the issue as the objection has become untimely.

This position gains force when the crucial factor—federal-state relations—is absent. Indeed, this case implicates no issues of federalism, for the question is not one of the federal courts' power to hear the case.[4] In fact one can discern a more flexible approach to subject matter jurisdiction when federal-state relations are not at stake. *Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978), is instructive. There the plaintiffs were attempting to avoid the exclusive jurisdictional provisions of 28 U.S.C. § 1491, which withdrew jurisdiction from the district courts and vested it in the Court of Claims. They argued that the unavailability of equitable relief in the Court of Claims precluded their being able to attain adequate relief.[5] The Second Circuit correctly rejected this argument, realizing that to do otherwise would "destroy[] the jurisdiction of the Court of Claims," by allowing every plaintiff to make similar claims. *Id.* at 934.[6] While the court did not address the opposite problem of a case that would

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[4] For an example of the issue of Article III power to hear a case, see, *e.g.*, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, and this Court's opinion in *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980).

[5] The FCIA, when it established the Claims Court to inherit the trial jurisdiction of the now-defunct Court of Claims, removed this restriction that had previously limited its predecessor. See 28 U.S.C. § 1507; S. Rep. 275, *supra*, at 22, reprinted in 1982 U.S. Code Cong. & Ad. News 11, 32.

[6] Accord, *S.J. Groves & Sons Co. v. United States*, 495 F. Supp. 201, 209 (D. Colo. 1980) (plaintiff requesting equitable relief that was a mask for monetary damages; court held that for it "to grant relief in excess of the jurisdictional limits of the Court of Claims in this case would undermine the jurisdiction of both").

defeat the jurisdiction of the Court of Claims only minimally, its consideration of legislative intent in establishing the Court of Claims suggests that an interpretation of the statute in another case that did not do such damage to the very core of the Court of Claims's jurisdiction might have been more favorably received.

Similar is *Municipal Intervenors Group v. Federal Power Commission*, 473 F.2d 84 (D.C. Cir. 1972), involving the Temporary Emergency Court of Appeals. That court was also a national court of appeals. It was established to promote uniformity of decision and to protect the President's anti-inflation program. The issue there involved public utility rate increases that the Federal Power Commission had allowed pursuant to the guidelines of the Economic Stabilization Act of 1970, as amended. This Act provided for appellate review in the Temporary Emergency Court of Appeals rather than in the regional circuits. Consequently, any decision rendered by a regional circuit would have contravened both of Congress's goals by allowing "the possibility of conflicting rulings by intermediate United States appellate courts, and danger to the anti-inflation program." *Id.* at 89.

Contrast that situation to the current one, and the differences are apparent. In the case now before us, the only legislative goal to be affected is that of judicial efficiency,[7] and allowing transfer would in fact make achieving that goal impossible. *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Commission*, 659 F.2d 1228 (D.C. Cir. 1981),

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[7] Uniformity was seen not to be affected by this case in footnote 3, *supra*.

underlines the importance of determining and implementing Congressional intent in a situation similar to the one now before us. This case also involved the Temporary Emergency Court of Appeals. If the D.C. Circuit had decided that the Federal Energy Regulatory Commission, the successor Commission to the Federal Power Commission, had acted pursuant to the Economic Stabilization Act of 1970 only the Temporary Emergency Court of Appeals would have had appellate jurisdiction. But if that Commission had acted under the Natural Gas Act, the D.C. Circuit would have had jurisdiction. The Commission had stated that the contested rate increase "was disapproved only because of its 'inconsisten[cy] with the Economic Stabilization Program.' " *Id.* at 1235 (quoting FERC Order). Such language shows that the disapproval was predicated on the Economic Stabilization Act, so that prior decisions by the D.C. Circuit in which the court had stated that it would not review orders " 'raising * * * issues which appear inextricably interwoven with issues arising under the Economic Stabilization Act * * * until review by the District Court and [the Temporary Emergency Court of Appeals] is completed,' " *id.* at 1237 (quoting *Connecticut Municipal Group v. Federal Power Commission*, 498 F.2d 993, 998 (D.C. Cir. 1974)), would be relevant. Nonetheless, the court accepted the Commission's argument that "it was simply importing Stabilization Act principles into the Gas Act" in an attempt "to harmonize the two statutes." *Id.* at 1235. It might be argued that the court's decision ultimately rested on judicial deference to an administrative agency's interpretation of its own order and so is inapposite. But the court's ratification of the Commission's close examination of legislative in-

tent, and its reluctance to deny jurisdiction to the regional circuits unless Congress had mandated clearly that doing so was its intent, indicate that our approach is the correct one.

The differing effects on Congressional intent explain and justify the various results reached in these three cases. What is most relevant about these cases is their close attention to legislative intent. The courts did not explain their results by reference to strict jurisdictional precepts about power. Instead their approach was to examine legislative intent and how that intent might best be served.[8] The Supreme Court adopted a similar tactic when dealing with judicial review of administrative agency action in *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62. The issue involved a conflict between the Shipping Act and the Administrative Orders Review Act. The Shipping Act provided that appeals of orders involving the Maritime Commission were to be taken in the same manner as orders of the Interstate Commerce Commission, in which event the district courts would have had jurisdiction over appeals when the district courts themselves originally referred the cases to the Maritime Commission. The Administrative Orders Review Act, on the other hand, would have required all appeals to be taken directly to the courts of appeals. The Supreme Court examined the legislative history of both Acts and concluded that "to make the procedure adopted [for review of cases referred to the Commerce Commission] applicable to maritime

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[8] Note too that the jurisdictional issue was raised in a timely fashion, so that a concern for judicial inefficiency resulting from a dismissal of the case was not a factor in any of these cases.

cases would vitiate the scheme of the Administrative Orders Review Act." *Id.* at 70. Consequently review could not be had in the district courts but must be had in the courts of appeals, despite express statutory language indicating otherwise. Congressional intent was the operative factor determining jurisdiction.

A fundamental concern in each of the many cases dealing with the division of jurisdiction between the courts and administrative agencies, and the appropriate court to which to bring an appeal, is Congressional intent. The Supreme Court dealt with the problem in *Rederiaktiebolaget Transatlantic*, 400 U.S. at 68-69; that case provides but one example. The nuances of the issue suggest the presence of a separation of powers problem, similar in quality if not in degree, to that confronting the courts when federal-state concerns are at issue. Because the jurisdiction problem had been raised in these cases in a timely fashion, the courts have not had the opportunity to examine the effect delay in raising the issue might have on Congressional intent in a given case. The flexibility courts sometimes accord to the jurisdictional issue in even the case of administrative agencies is seen in *Mansfield v. Weinberger*, 398 F. Supp. 965, 967 n.5 (D.D.C. 1975), in which the court accepted without discussion Secretary Weinberger's waiver of the requirement that agency action appealed from be final. Lack of finality ordinarily would have precluded review; the court's glancing treatment of the issue in a footnote suggests that subject matter jurisdiction assumes the same footing of other issues a party may raise when statutory competence rather than federalism and Article III power is at issue.

Cases treating untimely removal from state courts to federal courts also support this conclusion. Removal itself impacts on the power of the state courts to hear a cause of action so that federalism concerns are operative. See, *e.g.*, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109. Nonetheless federal courts do allow waiver to prevent "fundamental unfairness." *Maybruck v. Haim*, 290 F. Supp. 721, 724 (S.D.N.Y. 1968). They do so even when their refusal to remand restricts a state's judicial authority and even when the removal petition itself contravenes the Congressional statute. Also of interest is that different removal statutes may be construed differently, depending on Congressional intent. See *Manas y Pineiro v. Chase Manhattan Bank, N.A.*, 443 F. Supp. 418 (S.D.N.Y. 1978), construing the removal statute in 12 U.S.C. § 632 more narrowly than similar removal statutes governing certain criminal cases and tort claims involving the United States. Differing Congressional policy for the various statutes explained and justified the district court's remand to the state court. *Id.* at 420-421. Both the willingness to consider doctrines such as waiver and the examination of Congressional intent acknowledging implicitly that jurisdictional concerns when statutory competence alone is challenged lack the urgency and the special character of such claims when the scope of Article III power is being decided.

Not only Congressional intent, but also fairness may persuade a court to ignore the otherwise clear dictates of a statute. Cases involving estoppel provide a clear example with some relevance for the issue before us. In *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982), this Circuit approved the application of estoppel against the government "even

where [it] is acting in a sovereign capacity 'if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel.'" *Id.* at 1167 (quoting *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (9th Cir. 1973)). Those two factors manifestly support our decision in this case. Not only has the government unconscionably delayed its discovery of the possible jurisdictional defect, but its petition for rehearing deceptively handled the matter by neglecting to deal with the exceptions clause in Section 1295(a)(2) that on its face appears to deprive the Court of Appeals for the Federal Circuit of jurisdiction. The government's conduct forced the plaintiffs to surmise what the government's interpretation of that clause might be, a position made doubly unfair by the long delay on the government's behalf in raising the issue. It might be argued that the plaintiffs cannot blame the government, for the disputed provision is a statutory one of which they, as well as the government, are charged with knowledge, but this answer will not do. The provision is ambiguous, and as shown above, appears to exempt from its purview Section 1346(a)(2) actions involving Congressional legislation. The plaintiffs' interpretation of the provision, then, is certainly understandable, so that they cannot be charged with neglect. This is especially so since the government, which deals with Section 1295 on a daily basis, evidently failed itself to realize that Section 1295(a)(2) might not exempt this case from being heard by this Court.

In addition to the government's conduct and the public interest, this Circuit requires the consideration of whether estoppel would "undermin[e] important federal interests or risk[] a severe depletion of the

public fisc." *Portmann*, 674 F.2d at 1167. Contrary to undermining federal interests, refusing to transfer would actually promote those interests by furthering Congressional intent underlying the FCIA. Nor would a "severe depletion of the public fisc" occur. A substantial amount of money is at stake, but our transferring the case would not guarantee that the Federal Circuit would reach a position on the merits any different from the one we have reached. In fact, our decision on the merits is unchallenged in the rehearing petition, so that the Federal Circuit would seemingly conclude the same. Moreover, the situation before us is very unlike those cases, such as *Schweiker v. Hansen*, 450 U.S. 785, deciding whether certain benefits should be awarded in contravention of "valid regulations governing [their] distribution." *Id.* at 788. Our decision on the merits awards to the plaintiffs those sums that the government has unlawfully withheld from them. Those sums are not benefits deriving from government largesse, such as the welfare payments in *Schweiker*, but represent unpaid salary for which the plaintiffs labored and to which they are entitled. The case before us is not strictly an estoppel case, but the principles underlying such cases are sufficiently analogous to support the result reached here. This is especially true since our result accords with Congressional intent and awards the plaintiffs no windfall but merely gives them their unpaid salary that is their just due.

The government may argue that unfairness and prejudice to the plaintiffs and the impact on judicial efficiency are negligible here given the ease with which this case could be transferred to the Federal Circuit under 28 U.S.C. § 1631. That we could do so at this date is not crystal clear. First, the wording of

the statute suggests that it operates to allow courts to transfer cases before argument, as "[w]henever a civil action is filed in a court * * * and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such * * * appeal to any other such court in which the * * * appeal could have been brought at the time it was filed." The use of the phrase "[w]henever a civil action is filed" suggests that the appeal would be transferred as soon as possible, or at least when the jurisdictional defect was raised in oral argument. After a decision on the merits, the situation might very well be different and the opportunity to transfer lost. More importantly, the Section provides for transfer only if transfer would be in the interest of justice, a requirement not at all met in the instant situation. See *Hempstead County and Nevada County Project v. United States Environmental Protection Agency*, 700 F.2d 459, 462 (8th Cir. 1983) (proper analysis is to determine first whether a want of jurisdiction exists; second, whether transfer would be in the interest of justice; third, to transfer the action); *Slatick v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 698 F.2d 433, 434 (11th Cir. 1983) ("the dispositive question in this case is whether a transfer * * * would be in the interest of justice"). Transfer in the case before us would give the government a second bite at the apple and only result in needless expense and waste for the plaintiffs, the judges of the Federal Circuit, and ourselves. The government here leaves untouched the merits of the decision, and presumably the Federal Circuit would reach the same conclusion we have. Giving the government an additional opportunity to re-argue a decision that has already been

fully considered would be grossly unfair. Consequently Section 1631 should be unavailable.[9]

This Court's refusing to transfer at this late date is not without precedent. *Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984), is an opinion authored by Chief Judge Markey of the Federal Circuit, who was sitting by designation. Despite the plaintiff's claims there being based in part on 28 U.S.C. § 1346 (a)(2), and despite that same panel's *per curiam* decision, on the same day, in *Oliveira v. United States*, *supra*, to transfer for want of subject matter jurisdiction a claim also based in part on Section 1346 (a)(2), the Eleventh Circuit heard and decided *Milburn* on the merits. Very likely the jurisdictional issue was not raised or considered, but that the panel would transfer one case and decide the other the same day without noticing the jurisdictional problem at all seems incredible. That they did hear *Milburn* and decide it on the merits suggests that 28 U.S.C. § 1295 both lacks the absolute quality the government would give it and lacks the import of statutes regulating federal-state relations.

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[9] An alternative reading of Section 1631 would reach a different result. That result would require us to dismiss the case, if we could not transfer it because doing so would not promote justice. Before the enactment of Section 1631, the only alternative available when a court lacked subject matter jurisdiction was to dismiss the case. Inequities resulted when a party purposefully waited until very late in the litigation and after the expiration of the relevant statute of limitations for filing in the appropriate court before raising the jurisdictional question. This statute would prevent the harsh result of dismissal in such an instance by allowing transfers to promote justice. If this is the extent of the Section's reach, then it cannot operate to permit a court to choose either to retain jurisdiction or to dismiss when, as here, transfer would not be in the interest of justice.

The government's petition for rehearing is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1882

GEORGE SQUILLACOTE, et al., PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 81 C 1553—John W. Reynolds, *Judge*

ARGUED JANUARY 4, 1984—DECIDED JULY 13, 1984

Before CUMMINGS, *Chief Judge*, PELL and CUDAHY, *Circuit Judges.*

CUMMINGS, *Chief Judge.* This class action lawsuit is another in the series of cases challenging Congressional efforts in the late 1970's and early 1980's to brake the inflationary economy by means of limitations on salary increases authorized for federal employees. See, *e.g.*, *United States v. Will*, 449 U.S. 222; *Foley v. Carter*, 526 F. Supp. 980 (D.D.C.

1981). The plaintiff class is composed of 5,000-6,000 executive level federal employees who are members of the Senior Executive Service (SES) established in 5 U.S.C. §§ 3131-3136 (1982).[1] The named plaintiffs are 21 Regional Directors of the National Labor Relations Board. They complain that salary limitations enacted by Congress in Fiscal Years (FY) 1979, 1980, and 1981 should not have been applied to limit their salaries, because the SES pay system, established in 5 U.S.C. § 5382 (1982),[2] superseded the

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[1] Membership in the SES was drawn from the upper levels of the General Schedule pay system (GS 16-18) as well as from the lower levels of the Executive Service (Levels V and IV). 5 U.S.C. § 3132(a)(2).

[2] Section 5382 provides as follows:

> (a) There shall be 5 or more rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates. The rates of basic pay shall be initially established and thereafter adjusted by the President subject to subsection (b) of this section.
>
> (b) In setting rates of basic pay, the lowest rate for the Senior Executive Service shall not be less than the minimum rate of basic pay payable for GS-16 of the General Schedule and the highest rate shall not exceed the rate for level IV of the Executive Schedule. The payment of the rates shall not be subject to the pay limitation of section 5308 or 5373 of this title.
>
> (c) Subject to subsection (b) of this section, effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this title in the rates of pay under the General Schedule, each rate of basic pay for the Senior Executive Service shall be adjusted by an amount determined by the President to be appropriate. The adjusted rates of basic pay for the Senior Executive Service shall be included in the report

limitations, and the limitations by their own terms did not apply to SES members.

The complaint was filed in the United States District Court for the Eastern District of Wisconsin and jurisdiction was invoked pursuant to 28 U.S.C. § 1346(a)(2) (the Tucker Act). The parties filed cross-motions for summary judgment and agreed that the issue is solely one of law. In a careful opinion, Chief Judge Reynolds granted the government's summary judgment motion and denied that of the plaintiffs, holding that the case presented no genuine issue of material fact and the defendant was entitled to judgment as a matter of law. *Squillacote v. United States*, 526 F. Supp. 338 (E.D. Wis. 1983). Plaintiffs appeal from that decision. We affirm the district court's decision with regard to FY 1979 but reverse with regard to FY 1980 and 1981.

The Senior Executive Service (SES) was created as part of the Civil Service Reform Act of 1978 (CSRA) "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation, and otherwise is of the highest quality." 5 U.S.C. § 3131. To establish the SES, positions were to be converted from GS-16, 17, and 18 levels and Executive Schedule levels IV and V.[3] See 5 U.S.C. § 3132(a)(2).

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transmitted to the Congress by the President under section 5305(a)(3) or (c)(1) of this title.

(d) The rates of basic pay that are established and adjusted under this section shall be printed in the Federal Register and shall supersede any prior rates of basic pay for the Senior Executive Service.

[3] Before the SES pay system was enacted on October 13, 1978, the Executive and General Schedule pay systems were the two major pay and classification systems for federal executives. The General Schedule (GS) included 18 pay levels

The President was authorized to establish at least five SES pay levels as well as to set pay rates for the SES. 5 U.S.C. § 5382(a). Agencies were directed to designate positions deemed appropriate for conversion from the Executive or General Schedule to SES (P.L. 95-454, § 413(b)(1), 92 Stat. 1111, 1175), and employees serving in those positions at the time of the designation were entitled to elect to accept or decline conversion (*Id.*, Section 413(c)(1)). The actual conversion of positions to SES from the Executive and General Schedules took place on July 13, 1979, nine months after passage of the CSRA. See *id.*, Section 415(a)(1).

Like other federal pay systems, the SES does not exist in a vacuum but rather is part of an intricate web of legislation regulating both scheduled and payable rates of pay for federal employees. In addition to the statutes which establish the three pay systems already discussed and generally govern the overlapping of pay rates among the systems,[4] salary limitation provisions have been enacted periodically to cap for a prescribed period salaries of specified federal

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(GS-18 being the highest-paid level) and was the more comprehensive system. It covered civilian federal employees in a wide variety of positions, including but not limited to executive level employees. The Executive Schedule (ES) covered only executive rank employees. This schedule included five pay levels, with level I being the highest and level V the lowest-paid level. For more detailed explanation of the three federal pay systems (ES, GS, and SES), see 526 F. Supp. at 339-340.

[4] *E.g.*, General Schedule employees may not be paid more than employees at Executive Schedule level V (5 U.S.C. § 5308) and SES employees may not be paid less than the GS-16 rate or more than the Executive Schedule level IV rate (5 U.S.C. § 5382(b)).

employees. These limitations often have been enacted as part of the appropriations process, especially during times of national economic difficulties, and often are challenged by those whose compensation is thereby limited. See, *e.g.*, *U.S. v. Will*, 449 U.S. 222 (judicial salaries); *United States v. Dickerson*, 301 U.S. 554 (reenlistment bonuses); *Foley v. Carter*, 526 F. Supp. 980 (D.D.C. 1981) (non-Article III Judicial Branch salaries).

The case before us arises in a similar context. The plaintiff class (plaintiffs) argues that salary limitations enacted for each of the first three fiscal years SES was in existence (FY 1979, 1980, and 1981) did not apply to SES. Because the Office of Personnel Management (OPM) applied those limitations to SES, so that plaintiff SES members did not receive the total salary increases they would have otherwise received, plaintiffs sued for damages amounting to the difference between the salaries they received due to enforcement of the limitation and the salaries they would have received if the limitation had not been enforced. Because plaintiffs separately challenged each year's limitation in a separate count and because the relevant legal issues are different for each count, each count will be considered separately.

A. Count 1: FY 1979 (October 1, 1978 through September 30, 1979).

On September 30, 1978, a general limitation on FY 1979 salary increases was enacted. This limitation, Pub. L. 95-391, § 304(a), 92 Stat. 788-89 (hereinafter Section 304(a)),[5] froze salaries for FY 1979

[5] Pub. L. 95-391, § 304(a) (September 30, 1978) provided: No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act

at the rates that were payable on September 30, 1978. This limitation affected the salaries of federal employees if the rates for their positions were fixed at or limited to rates equal to or greater than rates payable for level V of the Executive Schedule pay system. *Id.*

Section 304(a) was enacted prior to the passage, as part of the Civil Service Reform Act, of 5 U.S.C. § 5382, which established the system for setting SES pay rates. Plaintiffs rely heavily on the fact of Section 304(a)'s earlier enactment in challenging the application of the Section 304(a) limitation to SES. First they argue that certain descriptive referents in Section 304(a), ostensibly broad enough to encompass Section 5382 and the SES, do not in fact so apply because Section 5382 and the SES were not yet in existence at the time of Section 304(a)'s passage. Second, they contend that even if Section 304(a) initially applied to SES, Section 5382 subsequently repealed the limitation's application to SES. Because we conclude both that Section 304(a) ap-

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may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—

(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or

(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

plied to limit FY 1979 salaries of even SES members and that Section 5382 did not repeal the Section 304 (a) salary limitation as applied to SES, we affirm the ruling of the district court that SES members were subject to the Section 304(a) salary limitation for FY 1979. Unlike the district court, however, we reach this conclusion without relying on legislative history for Section 304 or Section 5382. Because the language of both statutes is unambiguous on its face, such a review is unnecessary. See, *e.g.*, *Aloha Airlines Inc. v. Director of Taxation*, —— U.S. ——, 104 S.Ct. 291.[6]

1. *Section 304(a) applied to SES*

Section 304(a) describes the extent of its salary limitation by reference to the September 30, 1978 payable rate for positions; no salary could be paid "at a rate which exceeds the rate * * * of salary * * * payable for such office or position for September 30, 1978, * * *."[7] Plaintiffs suggest that because

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[6] *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, —— U.S. ——, 104 S.Ct. 439, cited by plaintiffs as additional authority pursuant to Circuit Rule 11, is inapposite here. In that case, the Supreme Court relied on H.R. No. 95-1403, issued in conjunction with the House version of the Civil Service Reform Act, to clarify an ambiguous term of Section 7131 of that act.

[7] Section 304(b) provides a mechanism for determining the September 30, 1978 rate for a position not yet in existence at that date. Under this mechanism, the rate for such a position is deemed to be the rate for a comparable position in existence on September 30, 1978. Comparability is determined for executive branch positions under regulations established by the President. Because there has been no showing that positions transferred to SES were treated under Section 304(b), this Court will not speculate about Section 304(b)'s applicability to the SES positions.

the SES was not yet established on September 30, 1978, their positions were not yet established either, so that Section 304(a) could not apply to them.

To decide for plaintiff on the basis of this argument, it would be necessary to conclude that the conversion of plaintiffs' positions from the Executive and General Schedules to the SES transformed these positions into new positions. But there is no basis for drawing such a conclusion. It is undisputed that plaintiffs did not receive new titles or take on new responsibilities when their positions were converted to SES on July 13, 1979. The Civil Service Reform Act created only a new pay system, not new positions with new responsibilities. The use of the word "conversion" in Section 413 of the Civil Service Reform Act (Pub. L. 95-454, § 413) to describe the administrative process by which positions were to be placed in SES makes clear that at least initially SES would be composed of already-existing positions.

Plaintiffs point out that Section 413(c)(1)(B) refers to an employee's right to elect to "accept conversion and be appointed to a[n SES] position." But this statement does not establish that the positions, once converted, are new, especially in light of the directive in Section 413(c)(1), apparently overlooked by plaintiffs, that "each employee serving in a position at the time it is designated as an [SES] position" has the right to accept or decline conversion. In sum, the conversion was a transfer of positions to the new SES pay system rather than a creation of new positions.

This Court adopts the holding of the district court that the Civil Service Reform Act "did not create new positions which would enable plaintiffs, by converting to those positions, to move out from under

the fiscal 1979 pay cap. For the purposes of Pub. L. 95-391 [Section 304(a)], the plaintiffs, after conversion to SES status, were regarded as continuing to hold 'office[s] or position[s]' existing on September 30, 1978." 562 F. Supp. at 343. Plaintiffs' positions, even after conversion to SES, continued to be subject to the Section 304(a) pay limitations.[8]

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[8] Plaintiffs point out that bankruptcy judges, whose positions were created in the Bankruptcy Reform Act of 1978, Pub. L. 95-598, enacted November 6, 1978, received 1979 salary increases authorized in Section 411 of that Act (11 U.S.C. § 411) despite Section 304(a)'s salary limitation. However, this does not provide support for plaintiffs' argument. The decision to pay the raises was made by the Administrative Office of the United States Courts (Pl. App. 37). So far as this Court has been able to determine, the validity of this administrative decision has never been judicially determined. *Foley v. Carter*, 526 F. Supp. 977 (D.D.C. 1981), on which plaintiffs rely heavily, does not decide that Section 411 superseded the Section 304(a) pay limitation. That court's reference to Section 411 merely paraphrases the language of Section 411, without even considering the possible impact of Section 304(a). *Id.* at 980 n.4. For this reason, we also find unpersuasive plaintiffs' suggestion that Section 411 of the Bankruptcy Reform Act supports, by analogy, a determination that Section 5382 repeals or supersedes Section 304(a).

It may be, as the district court below suggests, that the Administrative Office of the United States Courts correctly paid in FY 1979 the salary stated in Section 411 because the bankruptcy judges, unlike SES members, in fact assumed new positions with new responsibilities and so were not subject to Section 304(a). 562 F. Supp. at 347. However, that case is not before this Court and we express no opinion on the propriety of the action of the Administrative Office. Similarly, it is clear that the administrative action has no binding effect on this Court's decision in this case. In fact, that action is not even entitled to much deference since it at best indicates different views were held by different administrative offices about the applicability of Section 304(a) to different pay

Again relying on Section 5382's enactment subsequent to the passage of Section 304(a), plaintiffs argue alternatively that Section 304(a) does not describe their SES salary rates and therefore does not apply to them. By its terms (see *supra*, note 5) Section 304(a) applies to federal employees whose salary rates are (1) fixed at a rate at least equal to that for level V of the Executive Schedule (Section 304 (a)(1)); (2) limited pursuant to Section 5308 (Section 304(a)(2)); or (3) limited to a maximum rate at least equal to the basic pay rate for level V "[b]y reason of * * * any other provision of law or congressional resolution" (Section 304(a)(2)). The SES at least apparently comes within this description, since Section 5382(b) (*supra*, note 2) caps salaries of SES employees at the rate payable for level IV of the Executive Schedule, a rate greater than the rate for level V. However, without citing authority, plaintiffs claim that Section 304(a) cannot validly apply to SES because Section 5382(b), setting SES rates, had not yet been enacted when Section 304(a) was passed.

This view is erroneous. There is no constitutional or logical basis for deciding that a statute may never apply to one enacted subsequently. *Ely v. Velde*, 451 F.2d 1130, 1137 (4th Cir. 1971). Of course, the legislature enacting the second statute has the unfettered right to repeal expressly or impliedly the first statute (*id.*), but that is not the issue here. The issue

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authorization statutes. Cf. *Ely v. Velde*, 451 F.2d 1130, 1135 n.4 (4th Cir. 1971). The Office of Personnel Management of the Executive Branch determined that Section 304(a) was applicable to limit Section 5382 salary rates while the Administrative Office of the Courts decided Section 304(a) did not apply to bar Section 411 salary rates.

here is whether Section 304(a), by its own terms, was intended to apply to SES salaries limited pursuant to the subsequently-enacted Section 5382(b) cap. Only if Section 304(a) is broad enough to apply to SES salaries under these circumstances, is it appropriate to consider whether Section 5382 repealed Section 304(a) as to SES. We conclude that Section 304(a) is broad enough to, and in fact does, apply to SES and therefore shall consider the repeal issue, *infra*, Part A2.

Certainly Congress in Section 304(a) was establishing a far-reaching mechanism for limiting federal salaries during FY 1979. Section 304(a)(2)'s reference to "other provisions of law" expands the reach of the limitation to its fullest and brings under Section 304(a) exactly the kind of employees SES members are: those whose salaries were limited in FY 1979 to level V or above by any statutory provision, whether enacted before or during FY 1979.

Furthermore, plaintiffs' contention that Section 304(a) could not apply to the later-enacted Section 5382(b) leads to an absurd result. Given plaintiffs' interpretation, statutes could never apply to circumstances not in existence at the time of enactment of the original statute, so that, *e.g.*, "a 1925 statute dealing with 'news media' could not apply to television, and a 1930 statute dealing with 'motor cars' could not apply to Volkwagons." R. Dickerson, The Interpretation and Application of Statutes 129 (1975).

In sum, Section 304(a) applied to SES salaries because those salaries were limited to a rate "equal to or greater than the rate of basic pay for * * * level V [of the Executive Schedule] by reason of [Section 5382(b)] [an]other provision of law." Section 304(a).

2. *Section 5382 did not repeal Section 304(a) as to SES.*

Because this Court concludes that Section 304(a) applied to limit the salaries of SES members, it is necessary next to determine whether that application was cut off, or repealed, by the later-enacted 5 U.S.C. § 5382, which established the mechanism for setting SES pay rates. Section 5382 could repeal Section 304(a)'s salary limitation as to SES members if it contained express language of repeal, or if, absent express repeal language, it was in such irreconcilable conflict with the Section 304(a) salary limitation as to constitute an implied repeal. The district court concluded that Section 5382 neither expressly nor impliedly repealed the Section 304(a) salary limitation as to SES members. We agree.

Section 5382 mandates the initial establishment and periodic adjustment of at least 5 SES "rates of basic pay" which "supersede any prior rates of basic pay for the [SES]" (Section 5382(d)). The statute also directs that each SES member "shall be paid at one of the rates" (Section 5382(a)) and specifies that this payment "shall not be subject to the pay limitation of section 5308 or 5373 of this title [5]." (Section 5382(b)).

Plaintiffs assert that these provisions repealed the Section 304(a) pay limitation as applied to SES. First, they contend that Section 5382(d)'s direction that the rates set pursuant to Section 5382(a) supersede prior rates was an express repeal of the Section 304(a) pay limitation. But, as the district court aptly noted in rejecting this express repeal claim, "Sec. 5382(d) * * * cannot be interpreted to apply to Section 304(a) at all. As a salary limitation, Sec. 304(a) set *payable* rates for certain high-level fed-

eral employees. Sec. 5382(d), however, must be read to refer to *scheduled* rates." 562 F. Supp. at 344.

Plaintiffs argue that this reading tortures Section 5382 by assigning different meanings to the phrase "rates of basic pay" when used in different subsections of Section 5382. The premise underlying plaintiffs' argument is that this phrase, when used in subsection (a), means "payable" rates because that subsection directs that "each senior executive must be paid at one of the rates." Plaintiffs claim that "[a] rate of basic pay that *shall* be paid is a 'payable rate' by any definition" (Br. 31).

Plaintiffs' premise is erroneous. Section 5382 refers to both payable and scheduled rates, sometimes in the same subsection but never in the same phrase. The statute distinguishes carefully, if subtly, between the two concepts. Judge Reynolds was correct in concluding that "rates of basic pay," used in subsection (d), referred to scheduled rates. The phrase "rates of basic pay" is used throughout Section 5382 only as a term of art to describe the rates established or adjusted by the President and subsequently published in the Federal Register, *i.e.*, the scheduled rates.

Section 5382(a) states that "[t]he rates of basic pay shall be initially established * * *." Section 5382(b) provides for "setting rates of basic pay." Section 5382(c) directs that "each rate of basic pay for the [SES] shall be adjusted" and "[t]he adjusted rates of basic pay * * *" shall be reported to Congress. Finally, Section 5382(d) provides for printing in the Federal Register the established and adjusted "rates of basic pay" and directs that these printed rates "shall supersede any prior rates of basic pay."

On the other hand, the term "basic rate of pay" is never used when the statute refers to actual payment of salaries to SES members. Subsection (a) states

that "each senior executive shall be paid at one of the rates" rather than "one of the rates of basic pay." Similarly, subsection (b) provides that "[t]he payment of the *rates* shall not be subject * * *."

The careful usage of "rates of basic pay" cannot be dismissed merely as an attempt to avoid unnecessary verbiage by using "rates" synonomously for "rates of basic pay." If that were the statute's intent, the entire phrase "rates of basic pay" need only have appeared once in subsection (d), rather than the two times it in fact appears. Its repetition confirms that the phrase was intended to refer only to scheduled and not to payable rates. Subsection (d), which states that rates of basic pay printed in the Federal Register supersede prior rates of basic pay for SES, does not repeal the Section 304(a) limitation on rates payable to SES members.

It is arguable, however, that Section 5382(a)'s direction that "each senior executive shall be paid at one of the rates" repealed the Section 304(a) pay limitation as to those executives whose scheduled rates of basic pay in SES exceeded the rates they were paid prior to the conversion of their positions to SES. This claim fails also because Section 5382(b) modifies this Section 5382(a) direction. Section 5382(b) prohibits the application to SES of only two pay limitations, those in 5 U.S.C. §§ 5308 and 5373. In making this specific and narrow prohibition, Congress clearly expressed its intent that other pay limitations, including that in Section 304(a), would apply to SES. Far from constituting a repeal of Section 304(a), then, Section 5382 is actually an endorsement of the application to SES of that salary limitation.

There is also no basis for deciding that Section 5382 impliedly repealed the Section 304(a) pay limi-

tation. A later statute may be found impliedly to repeal an earlier one only when the two statutes are in irreconcilable conflict. *Hines, Inc. v. United States*, 551 F.2d 717 (6th Cir. 1977). But there is no conflict between the two provisions under review here.[9] As shown already, Section 5382 was intended to operate within the strictures of Section 304(a)'s pay limitation, so that while "Sec. 304(a) prohibited salaries in excess of level V [of the Executive Schedule, Sec. 5382 it] permits [but does not require] salaries up to level IV." 562 F. Supp. at 344.

B. Count 2: FY 1980 (October 1, 1979 through September 30, 1980)

On October 9, 1979, pursuant to 5 U.S.C. § 5382 (b) (reproduced *supra* at note 2), the President adjusted the rates of basic pay for SES,[10] increasing by

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[9] The existence of a conflict is prerequisite as well to deciding that a more specific statute prevails over one which is more general. *Morton v. Mancari*, 417 U.S. 535, 550-555; *United States v. Ohio Valley Company, Inc.*, 510 F.2d 1184, 1189 (7th Cir. 1975). Because there was no conflict between Section 5382 and Section 304(a), it is not necessary to determine which of the two statutes was the more specific. Nevertheless, like the district court, this Court finds unpersuasive plaintiffs' claim that Section 5382 is the more specific provision. See 562 F. Supp. at 344 and n.12.

[10] These rates for FY 1980, adjusted on October 9, 1979, were:

SES-1=$47,889
SES-2=$49,499
SES-3=$51,164
SES-4=$52,884
SES-5=$54,662
SES-6=$56,500

Exec. Order 12,165, 44 Fed. Reg. 58,671 reprinted in 5 U.S.C. § 5382 at 184 (1980).

approximately 5.6 to 7 percent the scheduled rates of basic pay previously established.[11] Since the FY 1979 pay limitation expired on September 30, 1979, there was apparently no bar, except 5 U.S.C. § 5382(b)'s (Section 5382(b)) Executive Schedule level IV cap, to paying SES members at the new scheduled rates immediately.

However, on October 12, 1979, a new salary limitation was enacted in P.L. 96-86 § 101(c), for FY 1980.[12] On the basis of this salary limitation, the

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[11] The SES rates initially established for FY 1979 were:

SES-1=$44,756
SES-2=$46,470
SES-3=$48,250
SES-4=$50,100
SES-5=$51,450
SES-6=$52,800

Id.

[12] The second and third paragraphs of Section 101(c), the only provision, of that section relevant here, provide as follows:

> For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year.
>
> *Provided further* That, for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970 [5 U.S.C. Secs. 5301-08], the Executive Salary Cost-of-Living Adjustment Act [5 U.S.C. Sec. 5318], or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * *

OPM continued to cap SES members' salaries at the Executive Schedule level V rate. This rate had been raised to $50,112.50 (the FY 1980 rate) from $47,500 (the FY 1979 rate). 562 F. Supp. at 341. As a result of OPM's decision, executives at SES levels 1 and 2 were paid at their scheduled rates but executives at SES levels 3 through 6 were paid at $50,112.50 (the level V rate) instead of at their scheduled rates.

Plaintiffs contend that the application of the Section 101(c) limitation to SES was improper because by its terms the limitation did not apply to them.[13] Consequently, they contend that SES salaries should have been subject only to the Executive Schedule level IV cap contained in Section 5382(b). Since the rate payable for level IV in FY 1980 was $52,750 (Govt. App. 47), applying only the Section 5382(b) cap to SES would result in executives at SES levels 1, 2, and 3 being paid their scheduled rates and executives at SES levels 4, 5, and 6 being paid $52,750 instead of their scheduled rates.

The district court, relying largely on Section 101 (c)'s legislative history, determined that the Section

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> the provisions of section 304 of [Public Law 95-391], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

[13] Plaintiffs also argue, alternatively, that if the limitation applied to them, their actual salary rates were miscalculated. Because of our conclusion as to the plaintiffs' first argument, we do not reach their second one.

101(c) limitation applied to SES. 562 F. Supp. at 347. We cannot agree.

Plaintiffs' argument is simple and brief. They contend that the second paragraph of Section 101(c) does not describe them. Paragraph 2 provides that federal executives "who under existing law are entitled to approximately 12.9 percent increase in pay" for FY 1980 shall receive instead increases of no more than 5.5 percent. Section 101(c), *supra*, note 12. Plaintiffs are correct in this contention. The "approximately 12.9 percent" figure in Section 101(c) apparently was derived by combining annual salary increases for FY 1979 and FY 1980 authorized for General Schedule employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301-5308, and for Executive Schedule employees under the Executive Salary Cost-of-Living Adjustment Act, 5 U.S.C. § 5318.[14] See Pl. Br. 43-44; Def. Br. 7. See also *United States v. Will*, 449 U.S. 200, 208. SES salaries were not adjusted pursuant to either of these statutes but instead were adjusted only at the discretion of the President, see 5 U.S.C. § 5382(c). Since SES members were not covered by the Acts that authorized the 12.9 percent increase referred to in Section 101(c), it is clear that they were not covered by the Section 101(c) salary limitation either.

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[14] The actual 12.9 percent figure is computed by adding the 7 percent salary increase approved for FY 1980 before the Section 101(c) limitation took effect, to federal salaries to which the 5.5 percent FY 1979 increase (deferred by P.L. 95-391 until the P.L. 95-391 limitation expired on September 30, 1979) had been added. This compounding of the increases resulted in a combined 12.9 percent increase and explains the 0.4 percent difference between the sum of 7 and 5.5 percent on one hand and 12.9 percent on the other. *United States v. Will*, 449 U.S. 200, 208 n.5.

There is also another reason for our conclusion that Section 101(c) does not apply to SES. By no method of calculations were SES members entitled in FY 1980 to salary increases of approximately 12.9 percent. If SES scheduled rates for FY 1979 and 1980 are compared (see *supra*, notes 10 and 11), even without taking account of the Section 5382(b) level IV cap, executives could receive increases of between 5.6 and 7 percent. If SES scheduled rates for FY 1980 (see *supra*, note 10), subject to the Section 5382(b) cap of $52,750, are compared with rates actually paid SES executives in FY 1979,[15] SES plaintiffs would be entitled to increases of between 6.5 and 11 percent. Even if the Section 5382(b) cap is disregarded (an approach which is incorrect because Section 101(c) refers to increases to which executives are entitled and SES executives are not

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[15] FY 1979 payable rates for SES were as follows:

SES-1=$44,756.00
SES-2=$46,470.00
SES-3=$47,500.00
SES-4=$47,500.00
SES-5=$47,500.00
SES-6=$47,500.00

(Govt. App. 46). The only exception to these rates was made for executives who converted to SES from Executive Schedule level IV. Upon conversion, they continued to receive the rate payable for level IV which in FY 1979 was $50,000. *Id.* Although the briefs are somewhat confusing on this point, at oral argument plaintiffs made clear that executives who transferred from level IV are not part of the plaintiff class. In any case, even if these executives were part of the class, it appears unlikely that they would be entitled to any significant recovery. To the extent that they continued to be paid the rate payable for level IV of the Executive Schedule, they would have already been paid all they are entitled to be paid under Section 5382(b).

entitled to increases beyond the Section 5382(b) cap), the FY 1980 increases do not fall within the "approximately 12.9 percent" range mandated by Section 101(c). Comparing 1980 scheduled rates, without regard to the Section 5382(b) cap, with 1979 payable rates results in increases close to 7 percent for SES levels 1 through 3 and increases of approximately 11.3, 15, and 19 percent for levels 4, 5, and 6 respectively.

The government suggested at oral argument that Paragraph 2 of Section 101(c) applied to SES members indirectly because increases in Executive Schedule rates, to which SES salaries are tied by the Section 5382(b) cap, would result in increases in the 12.9 percent range. However, this flies in the face of the facts presented to us, and the government has not demonstrated another calculation method using the facts in the record which would result in a 12.9 percent increase for SES members.

The government also points to the third paragraph of Section 101(c) to support its position that SES members are described in Section 101(c). That paragraph provides that:

> *Provided, further,* That for the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970, the Executive Salary Cost-of-Living Adjustment Act, or any other related provision of law, which would provide an approximately 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, * * * the provisions of section 304 of the Legislative Branch Appropriation Act, 1979, which limit the pay for certain Fed-

> eral offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term "at a rate which exceeds by more than 5.5 percent the rate" shall be substituted for the term "at a rate which exceeds the rate" where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent.

The government contends that the clause "the provisions of Section 304 * * * shall apply", coupled with the second paragraph's indirect application to SES, establishes that SES executives were subject to the Section 101(c) salary limitation.

Although the district court found this argument persuasive (562 F. Supp. at 347), we reject it. As already explained, the government has not provided any concrete support for its theory that SES members are described indirectly in Paragraph 2 of Section 101(c). This lack of concrete support is fatal to the government's claim. While it is true that a clause in Paragraph 3 indicates that Section 304 should continue in effect, that clause must be analyzed in context rather than in a vacuum. The district court apparently did not consider this clause in its proper context, which is at least Paragraphs 2 and 3 of Section 101(c) (*supra*, note 12).

Paragraph 3's substantive provisions are prefaced "*Provided further*, That for the purpose of carrying out this provision * * *." This introductory clause ties Paragraph 3 as a subdivision to Paragraph 2, so that Paragraph 3 applies only to executive employees already described in Paragraph 2, *i.e.*, those who but for Section 101(c) would have been entitled to 12.9 percent salary increases for FY 1980. Since Para-

graph 2 does not describe SES executives, Paragraph 3 cannot apply to them.

The government has not suggested any other plausible interpretation of Paragraphs 2 and 3, nor has it argued that Paragraph 3's tie to Paragraph 2 is an ambiguous or equivocal one. In fact, the tie is not ambiguous. The clause, "for the purpose of carrying out this provision," clearly indicates Congress' intent to marry the two paragraphs. "[T]his provision" logically can refer only to Paragraph 2 of Section 101(c). Neither Section 101(c) itself nor Section 101 nor even Pub. L. 96-86 includes any general purpose statement to which the clause might otherwise refer. Furthermore, Section 101(c), Paragraphs 2 and 3 are the only parts of Pub. L. 96-86 which discuss salary limitations for federal executives.[16] Even assuming Paragraph 3 may be considered alone as a separate provision unrelated to Paragraph 2, the government's argument must fail because by its own terms Paragraph 3's application is limited to Federal officials who would otherwise be entitled to a 12.9 percent salary increase. See *supra* note 12. As shown above, SES members simply were not part of that class.

Finally, the government suggests in its brief, and the district court agreed, that a Conference Report [17]

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[16] However, the fourth paragraph of Section 101(c) provides that "additional payment[s] under existing law" are not salary increases and Section 112, Pub. L. 96-86, limits the amount of funding available for executive branch travel expenses.

[17] In pertinent part, the Conference Report provides as follows:

> The conferees wish to note that by continuing the application of Sec. 304 of the Legislative Branch Appropriation Act, 1979 [Pub. L. 95-391], the joint resolution

for Pub. L. 96-86 makes clear that Section 101(c) applies to the SES. This Report was issued in connection with the Conference's presentation to Congress of the compromise version of Pub. L. 96-86 which was ultimately passed and is now under review here. See 562 F. Supp. at 346. To the extent that this report indicates that Section 101(c) was expected to apply to the SES, it is in conflict with the clear, unambiguous and unequivocal provisions of that Section, which applies only to federal executives otherwise eligible for 12.9 percent increases, a group which did not include SES. Review of a Conference Report, as the most reliable form of legislative history, often may be helpful for clarifying the meaning of a statute which is ambiguous, at least so long as the statute at least "imperfectly" expresses the message contained in the report, *Miller v. Federal Mine Safety and Health Review Commission*, 687 F.2d 194, 195 (7th Cir. 1983). However, even this form of legislative history may not be used to overrule a clear direction contained in the statute itself. See, *e.g.*, *Aloha Airlines, Inc. v. Director of Taxation*, —— U.S. ——, 104 S. Ct. 291, 294; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201; *United States v. Oregon*, 366 U.S. 643, 648; *Estate of Cowser v. C.I.R.*, No. 83-2329, slip op.

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ensures that many individuals in positions which were transferred to the new Senior Executive Service (SES) may not receive pay increases of more than 5.5 percent. Although under the Civil Service Reform Act the maximum rate of pay for the SES is set at level IV of the Executive Schedule, those positions transferred into the SES earlier this year which on September 30, 1978, were subject to the level V ceiling will continue to be subject to the level V ceiling.

H.R. Rep. No. 96-513, 96th Cong., 1st Sess., at 3 (1979).

at 4 (7th Cir., June 13, 1984); *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983). See also Luneburg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 Ind. L.J. 211, 215 (1982) ("[T]he exclusive means by which a legislature may create new law is by enacting a statute."). If Congress intended to apply the FY 1980 salary limitation to a broader group of federal executives than it specified in the statute, Congress had the power to draft the statute to do so. Cf. *Estate of Cowser*, *supra*, slip op. at 5. However, we may not now redraft the provision. *Id.*

Under these circumstances, this Court holds that the salary limitation of Section 101(c), Pub. L. 96-86, is inapplicable to plaintiffs. Consequently, plaintiffs are entitled to recover the difference between the salaries they actually received for FY 1980 and the salaries they would have received had they been limited only by Section 5382(b)'s Executive Schedule level IV cap.

C. Count 3: FY 1981 (October 1, 1980 through September 30, 1981)

Three joint resolutions were enacted during FY 1981 for the purpose of freezing federal employees' salaries at rates payable on September 30, 1980.[18] Plaintiffs concede that these resolutions required the freezing of SES members' salaries. However, they contend that the freeze was applied to an incorrect base. In short, they claim that some SES salary rates, as actually paid on September 30, 1980, were

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[18] Pub. L. 96-369 was passed on October 1, 1980; Pub. L. 96-536 was passed on December 16, 1980; Pub. L. 97-12 was passed on June 5, 1981.

artifically reduced because the FY 1980 salary limitation (Pub. L. 96-86, § 101(c)) was improperly applied to SES salaries. But for imposition of the FY 1980 salary limitation, SES salaries on September 30, 1980 would have been capped at the Executive Schedule level IV rate of $52,750. Instead, SES salaries were improperly capped on September 30, 1980 at the lower Executive Schedule level V rate of $50,112.50.

The district court determined that plaintiffs' salaries for FY 1981 were frozen at the proper rate. This determination was based squarely on that court's decision that Pub. L. 96-86, Sec. 101(c) "operated to cap SES salaries at level V during fiscal year 1980." 562 F. Supp. at 348. Since we hold that Pub. L. 96-86, Section 101(c) had no application to plaintiffs, it follows that plaintiffs' salaries for FY 1981 were frozen at improper rates, to the extent that the plaintiffs' salaries were frozen at Executive Schedule level V rates rather than at rates for Executive Schedule level IV.

Therefore, the order of the district court granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment is affirmed in part and reversed in part, and the cause is remanded to the district court for proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. WISCONSIN

Civ. A. No. 81-C-1553

GEORGE SQUILLACOTE, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

April 21, 1983

DECISION AND ORDER

REYNOLDS, Chief Judge.

INTRODUCTION

The plaintiffs, who are employees of the United States serving as members of the Senior Executive Service, have brought a three count action against the United States pursuant to the Tucker Act, 28 U.S.C. Sec. 1346(a)(2) (1976). They challenge the salary paid by the United States government to all present and former federal employees who served as members of the Senior Executive Service during the three time periods corresponding to the three counts of the complaint.[1] The named plaintiffs represent a

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[1] Count I covers the period from July 13, 1979, when the Civil Service Reform Act of 1978 went into effect, to October 1,

class consisting of all persons who were Senior Executive Service members during the relevant time periods and who were not paid at the applicable pay rates established by the President.

The parties have filed cross-motions for summary judgment. Both agree that the question before the Court is one of law. On the basis of the briefs submitted and the oral argument heard on September 28, 1982, the Court holds that there is no genuine issue of material fact presented in this case and that the defendant is entitled to judgment as a matter of law.

FACTS

I. *Federal Pay Rates and Systems*

A. The Executive Schedule

Title 5, Chapter 53 of the United States Code establishes statutory pay systems for federal employees of various levels. Under 5 U.S.C. Secs. 5311-18, the Executive Schedule consisting of five pay levels is the basic pay schedule for several high level executive positions ranging from Cabinet Secretaries (level I, the highest) to the Director of the National Park Service and the Deputy Commissioner of the Internal Revenue Service. Senior Executive Service positions are specifically excluded. 5 U.S.C. Sec. 5311(a), (b)(2). Rates of pay for positions within the Executive Schedule are established and adjusted in accordance with the Federal Salary Act of 1967, 2 U.S.C. Sec. 351, *et seq.*

1979, the end of fiscal year 1979. Count II covers fiscal 1980, from October 1, 1979, to October 1, 1980. Count III covers fiscal 1981, from October 1, 1980, to October 1, 1981.

B. The General Schedule

Most civilian employees of the federal government, however, are classified and paid in accordance with the General Schedule, 5 U.S.C. Secs. 5331-38. Pay rates for General Schedule employees are subject to annual adjustment under the Federal Pay Comparability Act of 1970 (Comparability Act), 5 U.S.C. Sec. 5301-08, to ensure that their salaries are brought in line with prevailing salaries in the private sector. Because no provision was made for similar annual comparability increases in Executive Schedule rates,[2] it was possible for higher level employees of the General Schedule to reach a pay level beyond those for positions within the Executive Schedule. To meet this problem, Congress imposed a pay ceiling on General Schedule employees to prevent them from receiving rates in excess of the lowest level of the Executive Schedule, level V.[3] Thus, level V limited the rates payable to General Schedule employees even though their scheduled rates were increasing by operation of the Comparability Act.

C. The Senior Executive Service

On October 13, 1978, a third statutory pay system was established by Congress to enhance mobility in the highest level of the Civil Service and thereby to provide more fully for the government's manage-

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[2] The Executive Salary Cost-of-Living Adjustment Act, 5 U.S.C. Sec. 5318, enacted in 1975, ultimately provided for a comparable adjustment of Executive Schedule rates of pay each year.

[3] The provision provides that "[p]ay may not be paid [to General Schedule employees], by reason of any provision of this subchapter [*i.e.*, the Comparability Act], at a rate in excess of the rate of basic pay for level V of the Executive Schedule." 5 U.S.C. Sec. 5308.

ment needs. The Civil Service Reform Act of 1978, 5 U.S.C. Sec. 5381-85, took effect July 13, 1979, and established the Senior Executive Service (SES). During the nine months between the time of the Act was enacted and the time it took effect, each federal agency was to designate certain positions for SES status, and the employees serving in those positions were given the option of voluntarily converting to the SES.

Section 5382 [4] of the Act provided for five or more SES rates of pay to be initially established and there-

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[4] Section 5382 provides in full:

"(a) There shall be 5 or more rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates. The rates of basic pay shall be initially established and thereafter adjusted by the President subject to subsection (b) of this section.

"(b) In setting rates of basic pay, the lowest rate for the Senior Executive Service shall not be less than the minimum rate of basic pay payable for GS-16 of the General Schedule and the highest rate shall not exceed the rate for level IV of the Executive Schedule. The payment of the rates shall not be subject to the pay limitation of sections 5308 and 5373 of this title [5 U.S.C. Sec. 5308 and Sec. 5373.]

"(c) Subject to subsection (b) of this section, effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of this title [5 U.S.C. Sec. 5305] in the rates of pay under the General Schedule, each rate of basic pay for the Senior Executive Service shall be adjusted by an amount determined by the President to be appropriate. The adjusted rates of basic pay for the Senior Executive Service shall be included in the report transmitted to the Congress by the President under section 5305(a)(3) or (c)(1) of this title [5 U.S.C. Sec. 5305(a)(3) or (c)(1)].

"(d) The rates of basic pay that are established and adjusted under this section shall be printed in the Federal

after adjusted by the President. The highest rate is not to exceed the rate for level IV of the Executive Schedule, and the level V pay limitation of 5 U.S.C. Sec. 5308 therefore is not applicable. Finally, Sec. 5382(d) states that "[t]he rates of basic pay that are established and adjusted under this section . . . shall supersede any prior rates of basic pay for the Senior Executive Service."

II. *The Statutory Pay Limitations*

A. Fiscal 1979: Pub.L. 95-391

On March 7, 1979, President Carter issued an order establishing six salary rates for SES.[5] When the new SES rates became effective on July 13, 1979, the government paid the SES-1 and SES-2 positions at the rates set by the President, but adhered to a level V ceiling for the other four positions, paying them at the level V rate of $47,500. Although Sec. 5382 of the newly enacted Civil Service Reform Act established a level IV ceiling of $50,000, the government decided to apply the level V pay limitation enacted earlier in Sec. 304(a) of Public Law 95-391. This decision, the plaintiffs contend, was erroneous.

Enacted September 30, 1978, Sec. 304(a) of Pub. L. 95-391 prohibited the use of any funds appropriated for fiscal year 1979 to pay the salary of any government employee at a rate in excess of the rate

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Register and shall supersede any prior rates of basic pay for the Senior Executive Service."

[5] The rates established were as follows:

SES-1=$44,756
SES-2=$46,470
SES-3=$48,250
SES-4=$50,100
SES-5=$51,450
SES-6=$52,800

payable on the date of enactment, if the rate payable to that employee was:

> "(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule . . .' or
>
> "(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for each level V . . . by reason of [5 U.S.C. Sec. 5308], or any other provision of law or congressional resolution."

B. Fiscal 1980: Pub.L. 96-86

Again pursuant to Sec. 5382 of the Civil Service Reform Act, the President, on October 9, 1979, issued an order adjusting SES rates of pay for fiscal 1980.[6] During the fiscal year 1980, the government continued to pay the plaintiffs and all other SES members at a rate limited by level V of the Executive Schedule. This level V rate was raised on October 12, 1979, by 5.5% from $47,500 to $50,112.50 with the enactment of Sec. 101(c) of Public Law 96-86.[7]

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[6] The adjusted rates of pay were as follows:

SES-1=$47,889
SES-2=$49,499
SES-3=$51,164
SES-4=$52,884
SES-5=$54,662
SES-6=$56,500

[7] Section 101(c) of Pub. L. 96-86 provides in pertinent part:

> "For the fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay

The plaintiffs argue that 5 U.S.C. Sec. 5382 still required payment at the level IV rate, raised by 5.5% to $52,750 by Pub.L. 96-86.

C. Fiscal 1981: Pub.L. 96-369, 96-536, and 97-12

On October 16, 1980, the President issued an order adjusting SES rates of pay for fiscal year 1981.[8] The government again paid the plaintiffs and their class at the level V ceiling of $50,112.50 for fiscal 1981 instead of the level IV rate ($52,750) allegedly

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and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year."

The Act provides further that:

"[F]or the purpose of carrying out this provision and notwithstanding the provisions of the Federal Pay Comparability Act of 1970 [5 U.S.C. Secs. 5301-08], the Executive Salary Cost-of-Living Adjustment Act [5 U.S.C. Sec. 5318], or any other related provision of law, which would provide an approximate 12.9 percent increase in pay for certain Federal officials for pay periods beginning on or after October 1, 1979, . . . the provisions of section 304 of [Public Law 95-391], which limit the pay for certain Federal offices and positions, shall apply to funds appropriated by this joint resolution or any Act for the fiscal year 1980, except that in applying such limitation the term 'at a rate which exceeds by more than 5.5 percent the rate' shall be substituted for the term 'at a rate which exceeds the rate' where it appears in subsection (a) of such section for the purpose of limiting pay increases to 5.5 percent."

[8] The adjusted rates for fiscal 1981 were as follows:

SES-1=$52,247
SES-2=$53,996
SES-3=$55,804
SES-4=$57,673
SES-5=$59,604
SES-6=$61,600

mandated by 5 U.S.C. Sec. 5382. In doing so, the government relied on three Joint Resolutions passed by Congress between October, 1980, and June, 1981: Pub.L. 96-369 (October 1, 1980); Pub.L. 96-536 (December 16, 1980); and Pub.L. 97-12 (June 5, 1981).

Each of these resolutions incorporated Section 306 of H.R. 7593, which prohibited the use of funds appropriated for fiscal 1981 to pay the salary of any federal employee at a rate in excess of the rate payable on September 30, 1980, if the rate payable to that employee was:

> "(1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule . . . , or
>
> "(2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V . . . by reason of [5 U.S.C. Sec. 5308], or any other provision of law or congressional resolution."

D. Fiscal 1982: Pub.L. 97-92

The SES rates were adjusted for fiscal 1982 by President Reagan on October 15, 1981.[9] From the beginning of fiscal year 1982 until January 1, 1982, the salaries of all SES class members remained limited to the level V rate of $50,112.50.[10] On Jan-

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[9] The fiscal 1982 rates were set at:

SES-1 = $54,755
SES-2 = $56,936
SES-3 = $59,119
SES-4 = $61,300
SES-5 = $62,950
SES-6 = $64,600

[10] The plaintiffs do not request payment for any compensation that may be due for the period October 1, 1981, to January 1, 1982.

uary 1, 1982, Pub.L. 97-92 became effective. Section 141(a) of that Act raised the ceiling on the level IV and level V rates of pay to $58,500 and $57,500 respectively.[11]

After January 1, 1982, SES salaries were capped for the first time at the level IV rate ($58,500), rather than at the new rate for level 1 ($57,500). This, the plaintiffs contend, was the first time they were paid the lawful rates established under 5 U.S.C. Sec. 5382(b).

DISCUSSION

I. *Count I: Fiscal 1979*

In Count I of the complaint, the plaintiffs seek to recover the difference between the salary amounts paid and the salary amounts which, they allege, should have been paid during the period commencing July 13, 1979, and ending October 1, 1979. The issue before the Court is whether the fiscal 1979 salary limit imposed by Section 304(a) of Public Law 95-391 was meant to govern the payment of SES members pursuant to the Civil Service Reform Act of 1978. The question is one of statutory interpretation.

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[11] Section 141(a) of Pub.L. 97-92 provides in pertinent part that:

> "[T]he rate of salary or basic pay, payable to any individual . . ., [shall not] be limited to or reduced to an amount which is less than—
>
> * * * *
>
> (2) $58,500, if such individual has an office or position the salary or pay for which corresponds to the rate of basic pay for level IV of the Executive Schedule . . .; or
>
> (3) $57,500, if such individual has an office or position the salary or pay for which corresponds to the rate of basic pay for level V of the Executive Schedule . . ."

The plaintiffs argue that Sec. 304(a) Pub.L. 95-391 does not by its terms apply to SES positions and that, even if it does, the rates of pay established for SES members under 5 U.S.C. Sec. 5382 supersede the earlier pay cap imposed by Sec. 304(a). Pub.L. 95-391 and the Civil Service Reform Act, they contend, are in irreconcilable conflict, and the latter and more specific statute providing for the payment of SES employees, at least impliedly if not expressly, repeals Sec. 304(a) just as Sec. 411 of the Bankruptcy Reform Act of 1978 did in settling the salary of the bankruptcy judges.

The government, on the other hand, asserts that the executive employees in this case who converted to SES status remained subject to the pre-existing salary limitation of Pub.L. 95-391. Its argument is based on legislative history surrounding the enactment of Public Law 96-86, the salary limitation for fiscal year 1980. That Act carried forward the Sec. 304(a) salary cap for certain federal employees. The government emphasizes Congress' failure to disapprove of the payment of SES members in fiscal 1979 at level V instead of level IV, and points to the Conference Report on Pub.L. 96-86, H.R. 96-513, as evidence that Sec. 304(a) was intended to cover the SES in fiscal year 1979.

Sec. 304(a) of Pub.L. 95-391 was passed on September 30, 1978. As a result, the salaries of certain federal employees were frozen during fiscal year 1979 at their September 30 level. This salary cap applied to any government position whose salary, on September 30, 1978, either was fixed at level V or above under the Executive Schedule or was limited to level V or above by 5 U.S.C. Sec. 5308 or some other statutory ceiling. Pub.L. 95-391, Sec. 304(a)(1)-(2)

(1979). It is not disputed that the plaintiffs, prior to their conversion to SES status, were subject to this salary cap for fiscal 1979.

On July 13, 1979, the conversion of the plaintiffs to SES status became effective and the Civil Service Reform Act of 1978 went into operation. Sec. 5382 (b) of the Reform Act established an independent salary cap for the SES members at level IV of the Executive Schedule and specifically exempted them from the level V limitation imposed on General Schedule employees by Sec. 5308 of Title 5.

This Court concludes first that as a matter of law, the plaintiffs, after conversion to SES employees, remained subject to the salary limitation of Pub.L. 95-391, Sec. 304(a)(2). As the briefs in this case reflect, the legislative histories of the Civil Service Reform Act and Pub.L. 95-391 are not helpful because neither makes direct reference to the other.

Admittedly, Congress failed to make Sec. 304 expressly applicable to SES members even though the CSRA was an important piece of legislation pending at the time. This fact, however, is not particularly enlightening. Similarly, it is neither significant nor necessarily illogical for Congress to have enacted a level IV cap for SES members presumably with knowledge of the earlier Sec. 304 limitation.

The Court holds that the CSRA did not create new positions which would enable the plaintiffs, by converting to those positions, to move out from under the fiscal 1979 pay cap. For the purposes of Pub.L. 95-391, the plaintiffs, after conversion to SES status, were regarded as continuing to hold "office[s] or position[s]" existing on September 30, 1978.

Additionally, once the plaintiffs had converted to SES status, they remained subject to the language of

Sec. 304(a)(2). Under Sec. 5382(b) of the CSRA, the salary of SES members was limited to the level IV rate, "a maximum rate which is equal to or greater than the rate of basic pay for such level V [and which is imposed] by reason of [a] provision of law or congressional resolution." See Sec. 304(a)(2), Pub.L. 95-391 (1979).

Indeed, Sec. 5382(b) itself specifically exempts SES employees from two particular pay limitations (5 U.S.C. Secs. 5308, 5373) but omits to mention Pub.L. 95-391. Therefore, between July 13, 1979, and September 30, 1979, when Pub.L. 95-391 expired, the plaintiff class of SES employees remained within the language of Sec. 304(a).

The Court also concludes as a matter of law that the rates of pay for SES employees established pursuant to 5 U.S.C. Sec. 5382(a) did not supersede or repeal Sec. 304(a) with regard to SES members. The plaintiffs contend that, even if Sec. 304(a) applied to SES members, the CSRA was in direct conflict with Pub.L. 95-391.

Consequently, they assert that the CSRA superseded Sec. 304 because it is the more specific act, it was enacted subsequent to Sec. 304, and it contains express language of repeal.

Sec. 5382(d) of the CSRA states that "[t]he rates of basic pay that are established and adjusted under this section . . . shall supersede any prior rates of basic pay for the Senior Executive Service." 5 U.S.C. Sec. 5382(d) (1978). This is not an express repeal of Pub.L. 95-391, Sec. 304(a).

> "The chief value of an express repeal is in the fact that it generally leaves no uncertainty as to whether the statutes or parts of statutes designated have been repealed. . . . Any description

> that identifies the affected act with reasonable certainty will suffice to hold the designation proper and to give effect to the repeal in accordance with the terms of the statute."
>
> 1A Sutherland Statutory Construction Section 23.07, at 219 (Sands 1972).

Sec. 5382(d) does not describe Pub.L. 95-391 with reasonable certainty. In fact, in the judgment of this Court, it cannot be interpreted to apply to Sec. 304(a) at all. As a salary limitation, Sec. 304(a) set *payable* rates for certain high-level federal employees. Sec. 5382(d), however, must be read to refer to *scheduled* rates of basic pay for the SES.

In Sec. 5382(a), the President is given the authority to establish and adjust an initial SES Schedule. In his Memoranda of March 7, 1979, President Carter established six scheduled rates of pay for the SES and warned the executive agencies that "the amounts *payable* to an individual before October 1, 1979, may be limited to the pay cap contained in Public Law 95-391." (Emphasis added). Plaintiffs' Exhibit 2, Memorandum of March 7, 1979 (PMX-2). Sec. 5382(d), therefore, provides that scheduled SES rates established and adjusted pursuant to subsection (a) shall supersede any prior scheduled rates. It cannot be understood to repeal all rates payable to the SES under pre-existing salary caps.

Alternatively, the plaintiffs argue that the CSRA impliedly repeals Sec. 304(a). It is presumed that legislatures intend to achieve a consistent body of laws; consequently, when this consistency cannot be maintained without the abolition of previous legislation, a repeal by implication may be found in the terms of the later enactment. Such a repeal is ultimately determined by the necessary effect of the later

enactment when applied in accord with the legislative intent. *See* 1A Sutherland Statutory Construction Sec. 23.09, at 223 (Sands 1972).

The plaintiffs aptly cite two rules of statutory construction to guide the Court in finding an implied repeal. The first rule provides that, in the absence of any clarifying statutory language or legislative history, the later of two conflicting statutes will supersede the earlier. *See, e.g., Hines, Inc. v. United States*, 551 F.2d 717 (6th Cir. 1977). The second dictates that, absent a clear intention to the contrary, the terms of a specific statute will prevail over those of the more general statute, without regard to the priority of enactment. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-5, 94 S.Ct. 2474, 2482-85, 41 L.Ed. 2d 290 (1974).

Both rules presuppose the existence of a clear statutory conflict. In determining whether such a conflict exists, however, a court must be guided by the well-recognized presumption against implied repeals. This presumption is overcome only by a showing that "the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation." 1A Sutherland Statutory Construction Sec. 23.10, at 231 (Sands 1972). If the subsequent enactment can be given effect by any reasonable construction, the inconsistency is not fatal and no repeal will be effected. *See Id.* Sec. 23.09, at 224.

Although this Court is not convinced by the plaintiffs' argument that the CSRA is a more specific enactment than Pub.L. 95-391,[12] a decision on the issue

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[12] Public Law 95-391 effects a temporary (one year) freeze on the salaries of a wide variety of high-level federal employees. The Civil Service Reform Act, although limited to a

is not necessary because, when the acts are construed in light of the relevant legislative history and with the aim of giving effect to both, their inconsistency is not fatal.

As this decision has already made clear, the statutory language of the CSRA can be dovetailed into the language of P.L. 95-391 without thwarting the operation of either act. Sec. 304(a) prohibited salaries in excess of level V. The CSRA permits salaries up to level IV. In 1979, the President established a schedule of SES rates which exceeded the pre-existing Sec. 304 pay cap. The SES Schedule, like the General and Executive Schedules, establishes salary rates to which the language of Sec. 304(a) applies.

The purpose of the CSRA, nevertheless was to create an executive level entitled to higher pay and capable of luring qualified personnel into government management. Although by applying the fiscal 1979 pay cap to the employees who converted to SES this statutory purpose is impeded to some extent, subsequent legislative history quite clearly indicates that Congress was aware of these cross-purposes and intended to cap even the SES salaries in 1979 in order to continue its fight against inflation.

As the plaintiffs correctly note, the legislative history of the CSRA, the most relevant source of Congress' intent, is silent as to the applicability of the Pub.L. 95-391 pay cap on SES salaries. Nevertheless, meaningful guidance is found in the legislative history of Pub.L. 96-86, the salary limitation of fiscal year 1980.

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more select group of employees, is not temporally circumscribed and, in fact, is quite comprehensive in its revision of the civil service system.

Discussed in more detail below, Public Law 96-86 took effect on October 1, 1979. It specifically extended Sec. 304(a)'s pay limitation for another fiscal year to ensure that federal salaries did not rise more than 5.5%. Having been passed subsequent to the CSRA, Pub.L. 96-86 is more revealing as to whether Congress intended to cap SES salaries in fiscal 1980 and also whether it had intended to cap those salaries in fiscal 1979 by enacting the predecessor act, Pub.L. 95-391.

House Joint Resolution 404, which later became Public Law 96-86, was considered and passed by the House on October 9, 1979, and by the Senate on October 10, 1979. A conference committee discussed the two versions of the bill and issued House Report No. 96-513 to accompany House Joint Resolution 412, the compromise version of the proposal legislation. On October 12, 1979, both houses of Congress agreed to the report.

The report, in referring to the agreement to restrict cost-of-living increases in federal salaries to 5.5%, included the following paragraph.

> The conferees wish to note that by continuing the application of Sec. 304 of the Legislative Branch Appropriation Act, 1979 [Pub.L. 95-391], the joint resolution ensures that many individuals in positions which were transferred to the new Senior Executive Service (SES) may not receive pay increases of more than 5.5 percent. *Although under the Civil Service Reform Act the maximum rate of pay for the SES is set at level IV of the Executive Schedule, those positions transferred into the SES earlier this year which on September 30, 1978, were subject to the*

level V ceiling will continue to be subject to the level V ceiling.

H.R.Rep. No. 96-513, 96th Cong., 1st Sess., at 3 (1979) (emphasis added).

This language conveys the firm belief held by Congress that the newly designated SES positions were indeed subject to the preexisting level V salary limitation in fiscal year 1979 and that this limitation on the salaries of SES members was to *continue* in fiscal year 1980 *despite* the level IV ceiling imposed by the Civil Service Reform Act. Recognizing that Sec. 304 imposed a level V ceiling on SES salaries in fiscal 1979, Congress then applied the pay cap of Pub.L. 95-391 to all funds appropriated for fiscal year 1980 and expressly extended the level V limitation. The Court finds this evidence, when viewed in conjunction with an accommodating interpretation of the statutory language, persuasive of Congress' intent to subject the plaintiff class to the pay limitation of Pub.L. 95-391.

Admittedly, legislative inaction is a "weak reed upon which to lean" in construing a statute. 2A Sutherland Statutory Construction Sec. 49.10, at 261 (Sands 1972). Nevertheless, a much stronger case is made when, as here, Congress is fully aware of an earlier legislative interpretation and, with that knowledge, takes legislative action pertaining to the construed statute which directly affirms that prior interpretation. *Id.* at 262.

Congress, it seems, was aware that the government had construed Sec. 304(a) to limit the pay of SES members to level V. In enacting Pub.L. 96-86, Congress did not reject the government's understanding of the legislature's intent, but instead told the govern-

ment to proceed in the same manner for the following year.

The plaintiffs, however, challenge the government's reliance on an isolated committee report as contrary to the rule in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). In *Hill*, the Supreme Court affirmed a lower court decision enjoining the completion of the Tellico Dam, which threatened to destroy the habitat of the snail darter, a small fish designated as an endangered species. When the multimillion-dollar dam project was nearly completed, the Secretary of the Interior issued a regulation pursuant to Section 7 of the Endangered Species Act ordering all federal agencies, in effect, to preserve the habitats of endangered species. Congress, however, continued to appropriate funds for the dam, indicating clearly in committee reports that it regarded the Endangered Species Act as inapplicable to the Tellico project.

The Supreme Court held that the language of the Endangered Species Act was plain and its legislative history clear in making no exception for projects like Tellico. Indeed, Congress contemplated that the Act's goals might even require the sacrifice of ongoing projects, 437 U.S. at 172-87, 98 S.Ct. at 2290-98. The Court further held that statements in the subsequent appropriations committee reports did not constitute an implied repeal of the Endangered Species Act. *Id.* 189-93, 98 S.Ct. at 2299-2301. The case thus stands for the proposition that an appropriations committee's expression does not operate to repeal or modify substantive legislation in which "Congress has spoken in the plainest of words." *Id.* 194, 98 S.Ct. at 2302.

Neither the language nor the legislative history of Sec. 304 and the CSRA expresses the clear Congres-

sional purpose present in *TVA v. Hill.* Indeed, Congress was silent on the effect its Civil Service Reform Act would have on pre-existing salary limitations. Furthermore, the conference report quoted above at Page 16 is not construed in this case as effectuating an implied repeal of Sec. 5382(d) of the CSRA. Rather, it is used as a tool for ascertaining Congress' intent in capping SES salaries notwithstanding the limitation of Pub.L. 95-391.

Certainly, House Report 96-513 is no more a legislative enactment than the views of appropriations committee members. Unlike the isolated expressions in *Hill*, however, the report came to the attention of the Congress as a whole and in fact was passed by both houses. Although House Report 96-513 cannot be considered part of the legislative history of either Pub.L. 95-391 or the CSRA and thus cannot override the unmistakable intent of the Congress that enacted those earlier statutes, when the precise intent of that enacting Congress is obscure, the views of the subsequent Congress as embodied in the weight as an expert opinion in the search of legislative intent. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596, 100 S.Ct. 800, 813, 63 L.Ed.2d 36 (1980). *See* 2A Sutherland Statutory Construction Sec. 49.11, 4th ed. C. (Sands 1972). The plaintiffs' reliance on *TVA v. Hill*, therefore, is misplaced.

Finally, the plaintiffs contend that the CSRA was a substantive legislative reform which superseded the appropriations limitation of Sec. 304(a) just as the Bankruptcy Reform Act of 1978, Pub.L. 95-598, superseded the same provision in setting the salary of bankruptcy judges. Prior to this bankruptcy reform legislation, referees in bankruptcy were paid an annual salary of $48,500, below their scheduled rate of

$51,200, because of the limitation imposed under Sec. 304(a) of Pub.L. 95-391. On November 6, 1978, the provision of the Bankruptcy Reform Act that related to the compensation of the new bankruptcy judges became effective. *See* Pub. L. 95-598, Sec. 402(d). That provision set the salary of United States bankruptcy judges at $50,000 and, as of November 6, 1978, superseded all prior rates of pay, including the pay limitation of Pub.L. 95-391. *See Foley v. Carter*, 526 F.Supp. 977, 980 n. 4 (D.D.C. 1981).

The analogy between the Civil Service Reform Act and the Bankruptcy Reform Act adds little to the plaintiffs' argument. Although both statutes are major pieces of reform legislation, they are not alike in their effect on prior pay limitations. The bankruptcy reform law effected a substantive reorganization of the bankruptcy system. In doing so, Congress created a new judicial position to replace the old referee in bankruptcy. This new position of United States bankruptcy judge was conferred new substantive responsibilities [13] and a salary commensurate with those responsibilities. The pay cap of Pub.L. 95-391 simply did not carry over to those employees found qualified to serve in the new judicial capacity.

Similarly, the Civil Service Reform Act effected a major reorganization of the civil service system in order to lure greater talent into the managerial positions of government service. This reform, however, was accomplished not by creating new senior positions with superior responsibilities, but by adjusting the pay system of the civil service. Federal employees

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[13] These new responsibilities came under constitutional attack in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, —— U.S. ——, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

holding certain managerial and supervisory positions were offered the option to convert to a higher paying status. Although there were also nonfinancial advantages and disadvantages in converting to SES status, the SES level employee did not assume a new position with new responsibilities. He thus remained subject to the pre-existing pay limitation imposed by Congress for fiscal 1979, while the United States bankruptcy judge did not.

II. *Count II: Fiscal 1980*

Count II of the complaint alleges that the government improperly withheld pay from the plaintiffs during fiscal year 1980, commencing October 1, 1979, and ending October 1, 1980. On October 9, 1979, President Carter established the schedule of SES rates of pay for fiscal 1980. *See supra* note 6. During fiscal year 1980, however, the plaintiffs were still paid at a rate limited by level V of the Executive Schedule. The government asserts that this level V pay cap was made applicable to SES members through fiscal 1980 by Sec. 101(c) of Pub.L. 96-86. The plaintiffs contend that Sec 5382 of the CSRA continued to require payment at the higher level IV rate through fiscal 1980 and that Sec. 101(c) did not apply to SES members.

Sec. 101(c), Pub.L. 96-86, had the effect of limiting the automatic salary increases for certain employees to 5.5% of existing pay. *See supra* note 7. There can be little doubt that Sec. 101 was meant to limit the pay of SES employees. Public Law 96-86 explicitly carried forward the fiscal 1979 pay cap imposed by Pub.L. 95-391, Sec. 304(a) through fiscal year 1980. This Court has already held in Part I of its discussion that the Sec. 304(a) pay limitation

applied to rates payable to SES employees. Furthermore, in passing Pub.L. 96-86, House-Senate conferees confirmed Congress' intention to limit the 1980 pay raise of SES members to 5.5% of existing pay:

> The conferees wish to note that by continuing the application of Sec. 304 of the Legislative Branch Appropriation Act, 1979 [Pub.L. 95-391], the joint resolution ensures that many individuals in positions which were transferred to the new Senior Executive Service (SES) may not receive increases of more than 5.5 percent.

H.R. Rep. No. 96-513, 96th Cong., 1st Sess., at 3 (1979). Thus, during fiscal 1980 the level V pay cap continued to limit SES salaries. The government paid its SES members at this level V rate, as adjusted by Pub.L. 96-86 in fiscal 1980, and is entitled to judgment as a matter of law on Count II.

III. *Count III: Fiscal 1981*

Finally, in Count III of the complaint the plaintiffs seek to recover the portions of their salary improperly withheld during fiscal year 1981, commencing October 1, 1980, and ending October 1, 1981. During this period the government continued to adhere to the level V limitation on payable rates for its SES employees. This limitation for fiscal 1981 was premised on three Joint Resolutions (Pub.L. 96-369, 96-536, and 97-12) which froze the pay of federal employees who were subject to salary ceilings of level V or above. The salaries were frozen at the rate payable on September 30, 1980. *See supra* Page 342.

The salary freeze imposed by these resolutions applied to all SES employees whether their pay was capped either at level IV or at level V. The plain-

tiffs' Count III claim arises because the government froze SES salaries at the level V rate, which it asserts was payable on September 30, 1980, rather than the level IV rate which the plaintiffs contend was mandated by Sec. 5382 of the CSRA. Consequently, the legal issue presented in Count III is whether the rate payable for SES salaries on September 30, 1980—the end of fiscal 1980—was properly capped at level V of the Executive Schedule. In Part II of its discussion, this Court held that Pub.L. 96-86, Sec. 101(a) operated to cap SES salaries at level V during fiscal year 1980. Therefore, during fiscal year 1981, the plaintiffs' salaries were frozen at the proper rate and it follows from the discussion regarding Count II that the government likewise is entitled to judgment on this third claim for relief.

CONCLUSION

In sum, the salaries paid to the plaintiffs during the fiscal years in question were properly limited by the level V ceiling initially imposed in Pub.L. 95-391 and carried forward in subsequent statutory pay caps.

WHEREAS there are no issues of material fact and the government is entitled to judgment as a matter of law,

NOW, THEREFORE, IT IS ORDERED that the defendant's motion for summary judgment is granted and the plaintiff's motion for summary judgment is denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before: Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 83-1882

GEORGE SQUILLACOTE, ET AL., PLAINTIFFS-APPELLANTS

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 81 C 1553—Judge John W. Reynolds

July 13, 1984

Opinion by Judge Cummings

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED in part, REVERSED in part, and the cause is REMANDED, in accordance with the opinion of this Court filed this date. Two-thirds of costs on appeal are awarded to plaintiffs, one-third awarded to defendant.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before: Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

No. 83-1882

GEORGE SQUILLACOTE, ET AL., PLAINTIFFS-APPELLANTS

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 81 C 1553—Judge John W. Reynolds

Nov. 7, 1984

ORDER

On November 2, 1984, we denied the petition for rehearing herein and intended that denial to subsume the suggestion for rehearing *en banc*. In the interest of clarity, the suggestion for rehearing *en banc* did not succeed because no member of this Court voted in its favor.

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No. 84-1284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE SQUILLACOTE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly refused to vacate its decision and transfer the appeal to the Federal Circuit after the case had been fully argued and decided by the court of appeals and where the court found that allowing transfer would defeat the purpose of the statute designating the appropriate appellate tribunal, 28 U.S.C. § 1295(a)(2).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE SQUILLACOTE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

That this case does not warrant the issuance of a writ of certiorari is apparent from a review of the carefully considered opinions issued by the court below (App. 1a and 20a).[1] After a unanimous decision on the merits, generally adverse to its interests, the government raised for the first time, on rehearing, a claim that the court of appeals lacked jurisdiction, arguing that the case should now

[1] "App. ____" refers to the government's Appendix to its Petition for a Writ of Certiorari.

be transferred to the Court of Appeals for the Federal Circuit for a hearing *de novo* before a different panel of circuit judges.

While the Petition is framed in the usual terms suggesting special significance, e.g., the decision below "threatens to undermine a long line of precedent" (Pet., p. 15) and "represents a significant interpretation of the Federal Courts Improvement Act" ["FCIA" or "the Act"] (Pet., p. 13), these claims of importance are not persuasive when one considers the limited parameters of the appeals court's opinion and the full circumstances of the issues presented (App. 4a).

1. This case was brought on behalf of a class of federal employees, all of whom are members of the Senior Executive Service ("SES"), seeking to recover wrongfully withheld back pay. Plaintiffs' ["Respondents"] claims raised no constitutional questions or novel issues of statutory construction. The court of appeals described the case as "another in the series of cases challenging Congressional efforts . . . [to limit] . . . salary increases authorized for federal employees. See, *e.g.*, *United States v. Will*, 449 U.S. 200 (1980); *Foley v. Carter*, 526 F.Supp. 977 (D.D.C. 1981)" (App. 20a-21a). Each of the appropriations measures at issue [Pub. L. 95-391, Pub. L. 96-86, Pub. L. 96-369, Pub. L. 96-536 and Pub. L. 97-12] has since lapsed and, significantly, the government has not asked this Court to review the decision on the merits. It seeks only to resolve a claimed jurisdictional issue, raised for the first time in a petition for rehearing, and if successful, to obtain a second chance to present its arguments to a different panel of circuit judges.

2. The court of appeals' jurisdictional ruling does not, as the government suggests, establish a "dangerous and

troublesome precedent" (Pet., p. 13), and is not a "significant interpretation of the Federal Courts Improvement Act" (Pet., p. 13). First, as the government concedes in its Petition (p. 11), the court of appeals interpreted Section 1295 consistent with the government's position, i.e. by concluding that if the question had been timely raised, the case would have been transferred to the Federal Circuit. Moreover, the case is of minimal precedential value since the possibility that future "little Tucker Act" cases will be considered by regional courts of appeals is unlikely, given the fact that the government is a party to all Tucker Act cases. Presumably, government attorneys hereafter will timely (before suffering an adverse decision on the merits) move to transfer to the Federal Circuit any such appeal docketed in a regional circuit court of appeals. Additionally, the court of appeals itself minimized the precedential value of its decision, strictly limiting its application to circumstances where "a case has been fully argued and decided . . . [and where] allowing transfer would defeat the purpose" of the statute designating the appropriate appellate tribunal (App. 6a).

STATEMENT OF THE CASE

In an initial opinion not at issue here, the court of appeals rejected respondents' argument that the Civil Service Reform Act superseded, as to SES employees, the earlier-enacted fiscal year 1979 pay limitation imposed under Section 304(a) of Pub. L. 95-391 (App. 34a). It found, however, that respondents' pay had been improperly limited during fiscal years 1980 and 1981, concluding that the

1980 limitation (Section 101(c) of Pub. L. 96-86) which was relied upon by the government to limit respondents' pay, was not applicable to members of the SES (App. 43a).

After the court issued its decision on the merits, the government argued for the first time that the Federal Circuit had exclusive jurisdiction of the appeal and that the case should be transferred to that court for a hearing *de novo*.

In refusing to vacate its decision, the court of appeals first considered whether the transfer would have been granted if it had been timely requested (App. 2a-4a). The court concluded, as the government contends, that the appeal should have been taken to the Federal Circuit (App. 4a). The court of appeals then carefully reviewed the legislative history of the FCIA and determined that the purposes of the Act would be wholly frustrated by allowing the government's "belated request" that its decision be vacated and the case transferred (App. 4a-6a). The Seventh Circuit noted that the legislative history of the FCIA addresses primarily the need for centralized review of patent appeals and that a secondary purpose of the Act was to "improve[ ] the administration of the system by reducing the number of decision-making entities within the federal appellate system" (App. 5a, *quoting*, S. Rep. 275, 97th Cong. 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 13). Because no patent issues are presented by this case, the court of appeals found that "the only statutory purpose that might be affected is the one of efficiency in the appeals process," and concluded that "acceding to the government's request would sabotage the goals of the legislation" (App. 5a). The court further noted that granting the government's request would "condone

the very forum-shopping repudiated by Congress in enacting the FCIA" (App. 6a).[2]

In rejecting the government's argument that a "jurisdictional" challenge may be made at any time, even after a decision on the merits, the court of appeals noted that 28 U.S.C. § 1295 does not implicate the power of the federal judiciary to consider the issues presented. Here "the question is not one of the federal courts' power to hear the case" (App. 9a).

The court then discussed a number of cases which demonstrate "a more flexible approach to subject matter jurisdiction when federal-state relations are not at stake" (App. 9a-12a). The court also found that basic fairness favored denial of the government's belated request that it vacate its decision and transfer this case (App. 14a), and that, under the circumstances of this case, transfer would not be "in the interest of justice" (28 U.S.C. § 1631) (App. 17a). Instead, to vacate the court's judgment on appeal and transfer the case to another court "would give the government a second bite at the apple and only result in needless expense and waste for the plaintiffs, the judges of the Federal Circuit, and ourselves" (App. 17a).

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[2] As was stated by the Senate Report, the FCIA "is not intended to create forum shopping opportunities between the Federal Circuit and the regional courts of appeals . . ." (App. 6a, *quoting*, S. Rep. 275, *supra*, at 19-20, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 29-30).

REASONS FOR DENYING THE WRIT

In its Petition, the government argues that principles of fairness, the interest of justice and legislative intent are not germane in resolving the question of whether 28 U.S.C. § 1295 requires the Seventh Circuit to vacate its carefully considered decision on the merits and transfer the case to the Federal Circuit. Insisting that the word "jurisdiction" warrants, in every instance, an inflexible adherence to the rules against waiver and estoppel, the government contends that even questions which "implicate not federalism but Congress's policies regarding the orderly division of business between the federal courts" (Pet., pp. 18-19) must be resolved in absolute terms.

1. The government's characterization of the Seventh Circuit's ruling on the jurisdiction issue is overbroad and inaccurate. It writes: "[T]he Seventh Circuit's holding that objections to subject matter jurisdiction may be waived and that, depending on the equities, a court may 'ignore the otherwise clear dictates of a [jurisdictional] statute' . . . will stand as a dangerous and troublesome precedent . . ." (Pet., p. 13). This characterization exaggerates the scope of the Seventh Circuit's opinion and fails to recognize that court's own carefully delineated limitation on its holding. As the court stated:

> [T]his is a rare exception to the jurisdictional scheme, which is dictated by the purposes underlying the FCIA. The unusual posture of this case guarantees that our decision is a very limited one. Only after a case has been fully argued and decided in a situation in which both the statutory meaning is ambiguous and allowing transfer would defeat the purpose of that statute would our decision be permissible (App. 6a).

The government's purported fear that this case will stand for the principle that subject matter jurisdiction can be waived is unfounded. The Seventh Circuit's refusal to vacate its judgment and transfer this case to the Federal Circuit was based on the very unusual circumstances presented by this case; its holding does not stand for the broad proposition that principles regarding subject matter jurisdiction are to be ignored whenever a court concludes that equity would dictate such a result (Pet., p. 13).

Respondents do not dispute that the federal courts are courts of limited jurisdiction and that true subject matter jurisdiction involves the court's *power* to hear a case. But as the Seventh Circuit noted (quoting Professor Wright[3]) the rule that a case should be dismissed on jurisdictional grounds after a decision on the merits is a "harsh rule" which can hardly be defended as a sensible regulation of procedure, and can only be justified by "the delicate problems of federal-state relations that are involved" (App. 8a). The court of appeals recognized that the "jurisdictional" question here does not present an issue affecting the division of judicial power between federal and state courts (App. 9a). No one disputes that this case belongs in the federal court system and that Section 1295, much like statutes and rules pertaining to venue, concerns only the division of judicial responsibilities among circuit courts of equal stature—not the existence of judicial power.

The Seventh Circuit concluded that when, as here, "the crucial factor—federal-state relations—is absent" a court

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[3] (App. 7a-8a). C. Wright, The Law of Federal Courts 23 (4th ed. 1983). See also, Hart and Wechsler, The Federal Courts and the Federal System 837-839 (2d ed. 1973); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 64-65, 370-74 (1969).

may take a "more flexible approach to subject-matter jurisdiction" (App. 9a). This "more flexible approach" necessitates consideration of both the congressional intent underlying the statute as well as notions of fairness and justice.

2. The Seventh Circuit discussed numerous cases in concluding that the intent of Congress in enacting the Federal Courts Improvement Act was relevant in deciding whether the case should be transferred to the Federal Circuit. See that court's discussion of *Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978), *Municipal Intervenors Group v. Federal Power Comm.*, 473 F.2d 84 (D.C. Cir. 1972), *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Comm.*, 659 F.2d 1228 (D.C. Cir. 1981), and *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) (App. 9a-13a). These cases do not reflect the government's rigid view of the nature of subject matter jurisdiction. Instead, the court in each of these cases examined legislative intent in resolving the issue of subject matter jurisdiction. The willingness of these courts to analyze congressional intent "acknowledge[s] implicitly that jurisdictional concerns when statutory competence alone is challenged lack the urgency and the special character of such claims when the scope of Article III power is being decided" (App. 14a). Such an examination is appropriate because the power of the federal judiciary to hear this case is not in question.[4]

[4] It should also be pointed out that, in marked contrast to the case at bar, the jurisdictional issue in each of these cases was timely raised and there was thus no concern, as there is here, that the losing party would get "two bites of the same apple" (App. 17a) or that the resources of the federal courts would be wasted

(Footnote continued on following page)

The government's reliance on *Flanagan v. United States*, ____ U.S. ____, 104 S. Ct. 1051 (1984), in support of its absolute and inflexible jurisdictional argument is misplaced. Indeed, *Flanagan* supports the result reached by the Seventh Circuit. The issue in *Flanagan* was whether the district court's order granting a party's motion to disqualify a law firm from multiple representation was a final and appealable order pursuant to 28 U.S.C. § 1291. In *Flanagan*, this Court gave careful consideration to the policies underlying Section 1291 to determine whether the district court should continue to hear the case prior to an appeal of that issue. This Court's analysis of the policies underlying Section 1291, including the promotion of the efficient administration of justice, is precisely the flexible approach used by the Seventh Circuit in the instant case.

The legislative history of the FCIA reveals that the primary purpose in enacting the statute was to develop a single forum for patent appeals.[5] A secondary purpose was to improve the administration of justice within the federal appellate system. S. Rep. No. 275, 97th Cong., 2d Sess. 3, *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 13. As the Seventh Circuit noted:

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[4] *continued*
by having a second court consider the merits of an appeal which had been fully adjudicated by another court of equal stature in the federal system.

[5] Prior to the enactment of Section 1295, the District Courts and the Court of Claims had concurrent jurisdiction over patent cases. The losing litigant had the right to appeal to the regional court of appeals, the Court of Customs and Patent Appeals and, in certain circumstances, the United States Court of Claims. The variety of forums led to inconsistent decisions in the area of patent law. That in turn led to forum shopping. H.R. Rep. No. 312, 97th Cong., 1st Sess. 20-21 (1981).

> [T]he only statutory purpose that might be affected is the one of efficiency in the appeals process. That being so, insuring that our decision fulfills this intent gains in importance. Our acceding to the government's request would sabotage the goals of the legislation. It would require the parties to reenact the process already fully complied with in our courtroom, thereby imposing additional and unnecessary delays and expense on both parties and on our judicial resources (App. 5a).

Clearly, to require that the Seventh Circuit's judgment be vacated and that the case be transferred to the Federal Circuit would be contrary to the intent of Congress in enacting the FCIA.[6]

3. The use of the word "jurisdiction" in Section 1295 is appropriate in the sense that this statute describes the kinds of cases to be reviewed by the Federal Circuit. However, it is not an apt term in the context of whether the statute is a general limitation upon the power of federal courts. To permit waiver in this case does not result in the exercise of judicial power which otherwise has been withheld from the federal judiciary by the Constitution or Congress.

Nor is the use of the term "jurisdiction" in Section 1295 controlling, at least in terms of whether rules of waiver and estoppel are applicable. This Court has been careful not to read the word "jurisdiction" in a vacuum. In fact, in *Panama R. Co. v. Johnson*, 264 U.S. 375 (1924), and *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), the Court

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[6] The transparency of the government's argument is further demonstrated by the fact that had the case been transferred to the Federal Circuit, the Chief Justice could have designated and assigned the members of the original panel in this case to the Federal Circuit to hear the case a second time (28 U.S.C. § 291).

interpreted a provision of Section 24 of the Judicial Code as a venue provision, although it used the word "jurisdiction." The statute provided: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." The *Panama* Court held that "the provision is not intended to affect the general jurisdiction of the District Courts as defined in Section 24, but only to prescribe the venue for actions brought under the new act. . . . Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance." *Panama, supra* at 385. See also, *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952) ("[t]he word 'jurisdiction' is an illusive and uncertain characterization, depending upon the environment in which it is employed"), *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 F. 200 (E.D. Mich. 1917) (use of word "jurisdiction" in Judicial Code not jurisdictional in strict sense), and *Interior Construction & Improvement Co. v. Gibney*, 160 U.S. 217 (1895) (defendant may waive "jurisdiction" at his election).[7] Thus the use of the word jurisdiction in a given statute or rule must be viewed in light of the purposes of the statute or rule sought to be applied.

4. It would be fundamentally unfair to grant the government's request to vacate the Seventh Circuit's decision and to transfer the case at this late date. The

[7] See also, *DiFrischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960) and *Klee v. Pittsburgh & W. Va. Ry.*, 22 F.R.D. 252 (W.D. Pa. 1958), both finding subject matter jurisdiction is subject to waiver in certain circumstances; *Vecchione v. Wohlgemuth*, 426 F. Supp. 1297 (E.D. Pa. 1977) (commenting on "the inequities which may stem from a blind adherence to the mistaken notion that an attack upon subject matter jurisdiction is forever available in all circumstances").

Seventh Circuit appropriately applied principles analogous to estoppel in refusing to do so (App. 14a-16a). While the government cites cases in support of its contention that estoppel is not generally applicable to issues of subject matter jurisdiction (Pet., p. 20), it should again be emphasized that this case does not present an issue involving pure subject matter jurisdiction, and the Seventh Circuit opinion does not attempt to alter longstanding jurisdiction principles which disfavor the employment of estoppel and waiver considerations where the existence of judicial power is involved. The Seventh Circuit held only that where a statute directs that appeals be taken to one of several federal courts of equal stature, where the crucial relations between federal and state power are not at stake, where the statute itself is ambiguous, *and* where denying jurisdiction at a late date would clearly undermine the congressional intent behind the statute, notions of fairness and estoppel become relevant.[8]

It is clear that in this situation the government's conduct was indefensible and threatened to cause serious delay in providing justice to the federal employee-members of the plaintiff class.[9] The government, as noted

[8] In discussing the question of "fairness," the government states that by moving for a hearing *de novo* it is "giving up a favorable judgment . . . with respect to fiscal year 1979" (Pet., p. 21), implying that the court should also have considered this fact in its examination of "fairness." The claims for fiscal 1979, however, involve less than eight weeks of back pay, or approximately 7% of respondents' claims; thus, the comparison is not a valid one.

[9] Respondents dispute the government's claim to a strong case on the merits for fiscal 1980 (Pet., p. 23), should it obtain a "second bite at the apple." The fiscal 1980 cap, by its terms, applied only to employees "who under existing law are entitled to approximately 12.9 percent increase in pay." The government contends that 82 percent of all SES members would have received an

(Footnote continued on following page)

by the Seventh Circuit, "deals with Section 1295 on a daily basis" (App. 15a) and is charged with knowledge of the workings of that statute. This point is further emphasized by the fact that the government has invoked Section 1631 in earlier cases to transfer cases involving Sections 1295 and 1346(a)(2) to the Federal Circuit, *e.g.*, *Oliveira v. United States*, 734 F.2d 760 (11th Cir. 1984), *Corwin v. Lehman*, 724 F.2d 1577 (Fed. Cir. 1984), *Spagnola v. Stockman*, 732 F.2d 908 (Fed. Cir. 1984), *Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983), and therefore had actual knowledge of the statute.[10]

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[9] *continued*
"11.3% raise" and that the fiscal 1980 pay cap therefore arguably applied to the SES (Pet., p. 24). The government's claim is both incorrect and misleading. First, as the Seventh Circuit found:

> Comparing 1980 scheduled rates, without regard to the Section 5382(b) cap, with 1979 payable rates results in increases close to 7 percent for SES levels 1 through 3 and increases of approximately 11.3, 15 and 19 percent for levels 4, 5, and 6 respectively (App. 39a).

Furthermore, as Petitioner well knows, the "approximately 12.9% increase" comes from a very specific and precise source—a source which has no application to members of the SES. As this Court previously explained (*United States v. Will*, 449 U.S. 200, 222 and n.5), the 12.9% increase for fiscal 1980 was computed by compounding the fiscal 1979 increase of 5.5% payable to other federal employees under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§5305 *et seq.*, and the 7% increase payable under that statute to such employees for fiscal 1980. These increases, when compounded, total exactly 12.9%. The 5.5% and 7% increases payable under the Comparability Act were not applicable to SES employees who are not covered by that statute. The SES increases (of 7% to 19%) were payable under the Civil Service Reform Act, 5 U.S.C. § 5382.

[10] The Seventh Circuit also observed that while it agreed generally with the government's interpretation of Section 1295, respondents "cannot be charged with neglect" because their contrary interpretation of the statute was "understandable" (App. 15a). In response to the petition for rehearing, respondents argued that

(Footnote continued on following page)

The court also considered the principle of fairness when it considered whether the requested vacation of its decision and transfer met the statutory requirement that a proposed transfer be "in the interest of justice." 28 U.S.C. § 1631. The Seventh Circuit concluded that to vacate its decision and transfer the case to the Federal Circuit, under the limited circumstances of this case (after argument and decision on the merits), would not be "in the interest of justice" (App. 17a). The court also noted in this regard that "refusing to transfer at this late date is not without precedent" (App. 18a, citing *Milburn v.*

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[10] *continued*
the Seventh Circuit had jurisdiction. Section 1295 gives the Federal Circuit jurisdiction over appeals from cases based on 28 U.S.C. § 1346 *except* when "*the claim is founded upon an Act of Congress* or a regulation of an executive department providing for internal revenue." (Emphasis supplied.) Respondents' claims are each founded on "an Act of Congress." The Seventh Circuit's conclusion that this exception applies only to Acts of Congress providing for internal revenue is not supported by the legislative history of the FCIA or by basic principles of statutory construction. "An Act of Congress" is a separate phrase without any qualifying language. Qualifying phrases apply to the words or phrases immediately preceding and are not to be construed as extending to others more remote. *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975); *Quindlen v. Prudential Ins. Co.*, 482 F.2d 876, 878 (5th Cir. 1973); 2A Sands, Sutherland Statutory Construction, § 47.33 at 159 (1973 ed.). Thus, the phrase "providing for internal revenue" applies only to the immediately preceding phrase—"a regulation of an executive department"—and not to the more remote phrase, "an Act of Congress." Additionally, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. *Azure*, *supra* at 900; *Quindlen*, *supra* at 878. Accordingly, the two phrases, "an Act of Congress" and "a regulation of an executive department providing for internal revenue" must be read as alternatives. *See also*, S. Rep. No. 275, 97th Cong. 2d Sess. 20, *reprinted in* 1982 U.S. Code Cong. & Ad. News 30 ("when the claim is founded on an act of Congress or a regulation for internal revenue . . . [it] will continue to go to the regional courts of appeals.").

United States, 734 F.2d 762 (11th Cir. 1984)).[11] *See also*, *Baker v. United States*, 722 F.2d 517 (9th Cir. 1983) and *Coleman v. United States Bureau of Indian Affairs*, 715 F.2d 1156 (7th Cir. 1983), and other Tucker Act cases decided by the regional courts of appeals since the creation of the Federal Circuit. If the government's theory is correct, the decisions in all of these cases are void.

CONCLUSION

For the reasons stated herein, respondents respectfully submit the Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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[11] *Milburn*, a case in which jurisdiction was based on Section 1346 (a)(2), was decided by the same panel of the Eleventh Circuit on the same date as *Oliveira v. United States*, *supra*, a case in which the circuit court decided it was in the interest of justice to transfer to the Federal Circuit. Significantly, the *Milburn* opinion was authored by Judge Howard Markey, Chief Judge of the Federal Circuit, sitting by designation. As the Seventh Circuit aptly notes:

> that the panel would transfer one case and decide the other the same day without noticing the jurisdictional problem at all seems incredible. That they did hear *Milburn* and decide it on the merits suggests that 28 U.S.C. § 1295 both lacks the absolute quality the government would give it and lacks the import of statutes regulating federal-state relations (App. 18a).

(3)

No. 84-1284

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FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE SQUILLACOTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondents' opposition is based almost entirely on their argument, repeated throughout their brief (at 5, 7, 8, 10, 11, 12), that the question in this case does not concern "pure subject matter jurisdiction" (Br. in Opp. 12) and that the court of appeals' "*power* to hear [the] case" (*id.* at 7; emphasis in original) is not at issue. These propositions are demonstrably false. No court has ever distinguished between grades of subject matter jurisdiction, with some "pure" and others not. And this case most certainly does implicate the fundamental power of the court of appeals to hear it: respondents admit (*id.* at 3) that the court of appeals held that under 28 U.S.C. 1295 it did not have jurisdiction to hear the appeal. That the jurisdictional issue was not "timely raised" cannot serve to create subject matter jurisdiction where none exists.

a. Respondents advance the same proposition relied on by the court of appeals — that jurisdiction is only an absolute when federalism is at stake. They cite not a single case in support of this notion. The utter absence (until the decision below) of judicial acceptance of such a curious idea is not surprising, for this Court has consistently accorded "full" jurisdictional status to statutes, such as Sections 1252 and 1291 of Title 28, that simply regulate the business of the federal courts (see Pet. 18-19). Moreover, because federal courts are constitutionally of limited jurisdiction, the respective powers of the states and the federal government are at issue whenever jurisdiction is questioned, even on statutory grounds. See *Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982).[1]

Respondents' attempt (Br. in Opp. 10-11) to convert Section 1295 into a venue provision is completely meritless. As we demonstrated in our petition (at 16-17), Congress plainly intended that Section 1295 operate as a jurisdictional statute, and it explicitly stated that the nonwaivability doctrine applies to its provisions. Respondents' reliance on *Panama R.R.* v. *Johnson*, 264 U.S. 375 (1924), is therefore misplaced.[2] In *Panama R.R.*, the Court gave effect to Congress's intent that a statute, though couched in jurisdictional language, provided only for venue and did not limit

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[1]Respondents argue (Br. in Opp. 8-9) that the willingness of courts to consider policy issues and legislative intent in interpreting jurisdictional statutes demonstrates that subject matter jurisdiction is flexible when federalism concerns are absent. This argument is plainly wrong. Of course courts may consider policy and legislative intent when they determine whether an ambiguous provision should be interpreted to vest jurisdiction in a particular court. But once that determination is made, the court cannot rely on generalized policy notions to retain a case it is not empowered to decide. Respondents cite no case looking to policy to disregard the nonwaivability doctrine.

[2]*Pure Oil Co.* v. *Suarez*, 384 U.S. 202 (1966), also relied on by respondents, simply notes and follows *Panama R.R.* (384 U.S. at 203).

the general grant of jurisdiction to the district courts in another statute. Here, by contrast, Congress's intent could not be plainer — its choice of the term "jurisdiction" in Section 1295 was deliberate and was intended to carry with it the full measure of absoluteness heretofore universally accorded limitations on subject matter jurisdiction.

Moreover, if Section 1295 is a venue statute, then there is no statute conferring actual jurisdiction over appeals from final judgments in the Federal Circuit, for Section 1291 explicitly exempts that court from its provisions. As the Court recently stated in *Lindahl* v. *OPM*, No. 83-5954 (Mar. 20, 1985), slip op. 23 n.30, "[v]enue provisions come into play only after jurisdiction has been established." Without an antecedent grant of jurisdiction, Section 1295 cannot possibly be viewed as relating to venue. It must be addressed to jurisdiction, *i.e.*, to the court's " 'power to adjudicate' " the controversy before it (*Lindahl*, slip op. 23).[3]

b. The failure of the parties to note the jurisdictional defect earlier in this proceeding does not and cannot constitute a waiver of the issue. That, indeed, is the meaning of the doctrine that the question of subject matter jurisdiction is always open. See, *e.g.*, Fed. R. Civ. P. 12(h)(3). The duty to inquire into jurisdiction rested here, as always, as much with the court of appeals as it did with the parties. As the court stated in *Potomac Passengers Ass'n* v. *Chesapeake & O. Ry.*, 520 F.2d 91, 95 n.22 (D.C. Cir. 1975) (citations omitted; emphasis added):

> It is a commonplace of federal procedural law that a court, whether trial or appellate, has a duty to notice a

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[3]In *Lindahl*, the Court described the Federal Courts Improvement Act of 1982, which enacted Section 1295, as establishing a "jurisdictional framework" (slip op. 22); the Court nowhere suggested that Section 1295 was not a jurisdictional provision.

> failure of subject matter jurisdiction on its own motion at any time during the proceedings. That both parties to this suit, and the trial judge, proceeded on the assumption that the case was properly before the District Court does not alter our responsibility. Federal subject matter jurisdiction cannot be created by consent, waiver, or even estoppel. * * * *If a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization.*

See also Pet. 17-18. In *Potomac Passengers Ass'n*, the court of appeals, while "regretful of the expenditures of time and energy which have gone into the * * * litigation," arrived at "the reluctant conclusion" that subject matter jurisdiction was not present, though the suit had been pending for several years and had already been before the court of appeals once earlier (520 F.2d at 95). The court of appeals in this case failed in its duty to hew to the limits imposed by Congress on its power to decide the case before it.

2. Unable to provide reasoned support for the court of appeals' decision, respondents contend that the case lacks significance. Respondents are incorrect. The decision below is important both with respect to the Federal Courts Improvement Act of 1982 and with respect to subject matter jurisdiction doctrine generally. As respondents recognize, the court of appeals' decision can be rationalized only on the erroneous ground that Congress did not mean what it said when it set forth the "exclusive jurisdiction" of the Federal Circuit in Section 1295. Such a precedent will be relevant in a variety of contexts — the jurisdiction of the Federal Circuit is complex and not always easily ascertained, hence a number of cases have been and will continue to be appealed in the first instance to the regional courts of appeals, though they belong properly only in the Federal

Circuit.[4] Should the regional courts of appeals follow the decision below, the Federal Circuit's jurisdiction will be improperly curtailed by the happenstance of when the jurisdictional defect is discovered.

Moreover, as we discussed in our petition (at 25), the court of appeals' ill-considered exception to the nonwaivability of jurisdictional defects (see Pet. App. 6a) has broad implications that would reach to virtually every jurisdictional provision. Transfer after argument and decision on the merits is usually inefficient, but that is the price paid for respect of the constitutional and statutory limitations on the power of the judiciary. The court of appeals' exception would swallow the rule — jurisdictional defects would always be waived after a decision on the merits.[5] Such an expansion of judicial power is unsupportable and should be corrected by this Court.

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[4]Respondents cite (Br. in Opp. 14-15) three cases in the regional courts of appeals that, they contend, should have been transferred to the Federal Circuit if our "theory is correct." However, not one of those cases addresses the waivability of jurisdictional defects under Section 1295; if respondents are correct that those cases were actually within the exclusive jurisdiction of the Federal Circuit, it only serves to demonstrate that Section 1295's provisions are not always obvious or capable of easy application, underscoring the importance of complying with its jurisdictional commands whenever they are discovered.

[5]The court of appeals' purported limitation to situations where the jurisdictional provision is ambiguous is nugatory, for the supposed ambiguity here is unrelated to whether the jurisdictional defect is waivable (see Pet. 15), and of course any jurisdictional statute can be found to contain some ambiguous language.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

REX E. LEE
Solicitor General

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